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## THE BIG ANTITRUST CASE IN THE TRIAL COURTS\*

PHILIP MARCUS†

It is not uncommon for one generation to assume that its burdens are greater than those of previous generations. The reaction of a number of trial and appellate judges in the last decade to the "big case" and the "big record" would seem to indicate that they have made such an assumption, or else that they are more restive under similar burdens. The writer is in no position to determine whether prohibition era judges had fewer burdens than those of the past two decades in which private antitrust cases, primarily in the motion picture field, have been unusually numerous.<sup>1</sup> It is a phenomenon of recent years, however, that "bigness" of antitrust cases has evoked as much, if not more, interest than the "bigness" of members of an industry against whom an antitrust suit is brought. In this article we intend to explore at some length the means and techniques available at the trial stage to expedite "big cases." It is a major thesis of this paper that the courts, in their pursuit of expedition in "big cases," should not endanger more important objectives commonly associated with judicial proceedings.<sup>2</sup>

### THE PROBLEM, REAL AND MYTHICAL—REACTION OF THE JUDICIARY AND THE BAR

One of the less controversial statements in this article is that clogged court calendars are a bar to justice. It is true that "big cases" play their part in clogging the calendars of the courts,<sup>3</sup> but they are only one of

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\* The views expressed are the personal views of the writer.

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1. In 1951 there were over 100 antitrust cases pending against motion picture companies. *Hearings on H.R. 3408 Before a Subcommittee of the House Committee on the Judiciary*, pt. 3, 82d Cong., 1st Sess. 39, 111 (1951). Although antitrust litigation in the motion picture industry has been customary, between 1946 and 1952 there was an appreciable rise in the number of cases filed; probably as an aftermath of the Government's success in its antitrust suit against the major motion picture companies. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The great majority of these cases never reached trial, and there has been an appreciable decrease in the number of such cases in recent years. Although more government antitrust cases have been filed in the last 20 years than in any other similar period, the annual total is not large. See Table C-8, *DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP.*

2. Cf., Dession, *The Trial of Economic and Technological Issues of Fact*, 58 *YALE L. REV.* 1019, 1271 (1949); Clark, *Special Pleading in the "Big Case,"* 21 *F.R.D.* 45-47 (1958).

3. See 1950 *DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP.* 69.

several factors, many of more importance, which cause judicial backlogs.<sup>4</sup>

Attempts to deal with the problem of the "big case" in the trial courts culminated in a *Report on Procedure in Anti-trust and Other Protracted Cases* (hereinafter referred to as *Report*), adopted by the Judicial Conference of the United States on September 16, 1951;<sup>5</sup> and in a *Handbook of Recommended Procedures for the Trial of Protracted Cases* (hereinafter referred to as *Handbook*), adopted by the Judicial Conference of the United States in March 1960.<sup>6</sup> In view of their importance to the subject matter of this article, a brief review of the antecedents of the *Report* and the *Handbook* might well precede discussion of their contents.

The impetus to action by lawyers and the courts with respect to the problem of the "big case" appears to have been imparted by a thoughtful article by Judge Prettyman of the United States Court of Appeals for the District of Columbia which appeared in the September 1948 issue of the *American Bar Journal*.<sup>7</sup> Since that time, there has been much literature about the problem of the "big case" in the trial courts.<sup>8</sup> Judge

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4. Other factors include the paucity of judges in certain districts in relation to the number of cases filed (now being somewhat alleviated), poor administration of particular courts, major variations in the abilities of various judges, and age and health handicaps of judges. See FIELD STUDY OF THE OPERATIONS OF U.S. COURTS, REP. TO SEN. APPROPRIATIONS COMM., at 10 (April 1959). It was apparently only after several years of recommendations by the Attorney General that the Judicial Conference recommended that all preliminary motions in a "big case" should be decided by the judge who will hear the case. See REPORT, note 5 *infra* at 38. For many years after the REPORT there continued to be considerable variation on the part of federal district courts in observing this recommendation. The Southern District of New York was a backslider in this respect until quite recently. See *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges* held at New York University Law Center, N.Y. City, Aug. 26-30, 1957 (hereinafter cited as 1957 Seminar), 21 F.R.D. 395, 420 (1958); *Proceedings of the Seminar on Protracted Cases for United States Judges* held at the School of Law, Stanford Univ., Stanford, Calif., Aug. 25-30, 1958 (hereinafter cited as 1958 Seminar), 23 F.R.D. 319, 577 (1959); Special Committee Report, *Streamlining the Big Case*, 13 A.B.A. SECT. ANTITRUST L. 183, 186 ff. (1958).

5. Printed in booklet form and distributed by the Administrative Office of the United States Courts, upon authorization of the Judicial Conference of the United States, U.S. Gov. Print. Off., 1955 0-325919, the Report (often called the Prettyman Report) is hereinafter cited as REPORT. The full text of the REPORT is reported in 13 F.R.D. 62 (1953).

6. Printed in pamphlet form by West Publishing Co., the Handbook is hereinafter cited as HANDBOOK. The full text of the HANDBOOK is reproduced in 25 F.R.D. 351 (1960).

For a discussion of the facilitation of introduction of evidence before the Restrictive Practices Court in England, see Korah, *The Restrictive Practices Court*, 12 CURRENT LEGAL PROBLEMS 76, 79 ff. (1959).

7. Prettyman, *Needed: New Trial Technique: Suggestions for the Trial of Complicated Cases*, 34 A.B.A.J. 766 (1948).

8. See McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950); Whitney, *The Trial of an Anti-Trust Case*, 5 RECORD OF N.Y.C.B.A. 449 (1950); Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 RECORD OF N.Y.C.B.A. 59 ff. (1951); Yankwich, *Observations in Anti-Trust Procedures*, 10 F.R.D. 165 (1951); Gesell, *Procedure in Antitrust and Other Protracted*

Prettyman's article contained only a passing reference to antitrust cases, but much of the subsequent literature has been the product of attorneys associated with law firms which commonly represent big defendants in antitrust litigation. It is not surprising to find, therefore, that such articles center around antitrust cases.<sup>9</sup> Judicial complaint about antitrust cases has also, at times, been quite forceful.<sup>10</sup>

The *Report* was authored by a committee of ten judges appointed in December, 1949<sup>11</sup> to examine the procedure governing the trial of "big cases." The Committee considered the matter at some length. It conferred with representatives of the Antitrust Division of the Department of Justice as well as with practitioners who commonly represented "big" defendants in antitrust cases. A tentative draft of their findings was circulated among the more experienced trial attorneys in the Antitrust Division of the Department of Justice, as well as among other antitrust lawyers and judges. The Committee, whose report was adopted by the Judicial Conference, was not a continuing one, but it did encourage additional suggestions as to procedure in "big cases."<sup>12</sup> The *Report* was widely distributed among courts and lawyers.<sup>13</sup> Despite the fanfare with which it was announced, its use was not noteworthy.<sup>14</sup> It furnished, however, the impetus for the publication in 1954 of the influential *Report*

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Cases, 65 HARV. L. REV. 1085 (1952); Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41 (1953); Ryan, *A Judicial Solution to the Procedural Problems of the So-Called Big Case*, 41 GEO. L. J. 182 (1953). Cf. Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L. J. 1019 (1949); Nitschke, *Procedure in Antitrust Investigations* [1950 Winter] U. ILL. L. F. 593; Cahill, *Some Recent Trends and Developments in the Anti-Trust Law*, 1 RECORD OF N.Y.C.B.A. 201 (1946).

9. See McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A.J. 289 (1952); Whitney, *supra* note 8; Gesell, *supra* note 8. In the last mentioned article the author suggests as a solution to the "big case" problem that fewer antitrust cases be tried. See also 1957 Seminar, 21 F.R.D. 395, 427 (1958). For a view that the HANDBOOK rules may have an adverse effect on plaintiffs and their attorneys, see Letter, 47 A.B.A.J. 847 (1961). In every antitrust case with which this writer has been associated, it has been the Government which has initiated procedures designed to expedite such cases.

10. See remarks of the Chief Justice of the United States District Court for the Southern District of New York, [1952] C.C.H. ANTITRUST LAW SYMPOSIUM 15. See also 1957 Seminar, 21 F.R.D. 395, 490-91 (1958).

11. Prettyman, Stone, Magruder, Augustus N. Hand, Lindley, Chestnut, Kloebe, Leahy, Leibel (who took the place of former Judge Rifkin), and Yankwich.

12. See 1957 Seminar, 21 F.R.D. 395, 538 (1958).

13. See 1958 Seminar, 23 F.R.D. 319, 387 (1959). The Conference desired that publicity be given the REPORT through the media of bar journals and law school publications. See REPORT, p. 40. The comments that have been made, even when perfunctory, undoubtedly have ensured a wide acquaintance with the existence of the REPORT. See McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigations*, 38 A.B.A.J. 289 (1952); Gesell, *Procedure in Antitrust and Other Protracted Cases*, 65 HARV. L. REV. 1085 (1952); Book Reviews: Loos, 20 GEO. WASH. L. REV. 366 (1952); Seidel, 36 MARQ. L. REV. 133 (1952); 20 J. OF KAN. BAR ASS'N 271 (1952).

14. See 1958 Seminar, 23 F.R.D. 319, 387 (1959).

by the Committee on Practice and Procedure in the Trial of Antitrust Cases of the Section of Antitrust Law of the American Bar Association (hereinafter referred to as the 1954 A.B.A. Report).<sup>15</sup> A series of reported seminars in which pretrial procedure was emphasized also resulted in considerable attention being paid to the Report.<sup>16</sup>

The *Handbook* was the work of a panel of district judges appointed in 1956 to make a study of special problems in the pretrial of long and complicated cases. The Report was their starting point of reference.<sup>17</sup> This study group<sup>18</sup> worked closely with the Antitrust Section of the American Bar Association. The writer believes the resulting *Handbook* owes its improvement over the Report to the assistance of that Section. He also feels that some of its more dubious provisions may have been influenced by the fact that the Section is heavily weighted with members of the bar who commonly appear as counsel for defendants in antitrust suits.<sup>19</sup> The title of the Report made the "big case" practically synonymous with antitrust cases.<sup>20</sup> The *Handbook* is more perceptive in this regard, but the emphasis in both is on antitrust cases.<sup>21</sup> The problem of the big antitrust case does exist, but the writer believes it has been much exaggerated.<sup>22</sup> In actuality, if "big cases" are considered as such when

15. The report [hereinafter cited as 1954 A.B.A. REPORT], due to its length, was not printed in the 1954 A.B.A. SEC. ANTITRUST L., but was printed separately by the A.B.A.

16. See 1957 Seminar, 21 F.R.D. 401 (1958); 1958 Seminar, 23 F.R.D. 319 (1959).

17. *Id.* at 388.

18. Judges Albert Bryan, Henry N. Graven, Gilbert H. Jertberg, Seybourn H. Lynne, Joseph C. McGarraghey, Alfred P. Murrah, Frank A. Picard, Royce H. Savage, William F. Smith, William E. Steckler, and Charles E. Wyzanski.

19. The HANDBOOK makes frequent references to reports of the Antitrust Section of the American Bar Association.

20. This supposed synonymity has been promoted by others. See 1958 Seminar, 23 F.R.D. 319 (1959).

21. But both the REPORT and the HANDBOOK recognized: (1) that not all antitrust cases are "big"; (2) that other types of suits may be "big" cases.

22. See Baldridge, *Simplifying and Expediting Cases*, [1951] C.C.H. SYMPOSIUM ON BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 23. A study of the records in seven antitrust cases in the 1950 term of the Supreme Court reveals that one exceeded 9,000 pages, one was in excess of 5,000 pages, two were over 2,000 pages, and three were under 500 pages. The record of one non-antitrust case that term exceeded 9,000 pages. In the 1951 term there were seven antitrust cases before the Court, and two others in which the antitrust laws were an element. Of the seven, one had a printed record of about 7,000 pages, but three had a record of less than 300 pages. There were several non-antitrust cases with records of large size. In the 1958 term, the antitrust case with the largest record, 860 pages, was surpassed in this respect by two non-antitrust cases. There were four antitrust cases argued that term.

From January 1, 1946 through June 10, 1953, 317 cases were brought by the United States under the Sherman Act, of which 60 were tried on the merits; and in only 20 of these did the trial last more than a month. Address by Chief of the General Litigation Section of the Antitrust Division on *Some Procedural Problems in Protracted Antitrust Trials*, 1953 Institute Federal Antitrust Laws, University of Michigan, June 19, 1953. And see statistics compiled by Yankwich, *Observations on Antitrust Procedures*, 10 F.R.D.

the trial extends beyond several weeks or the record dips into thousands of pages, many antitrust cases are not "big cases."<sup>23</sup> Of course a big antitrust case may be big indeed. The *Report* refers to ten antitrust cases tried over the prior twelve years in which the exhibits ran into thousands and the record into many more pages.<sup>24</sup> One of these, *United States v. Aluminum Company of America*,<sup>25</sup> lasted over two years with minor interruptions.<sup>26</sup> The writer does not, however, classify *United States v. Morgan*<sup>27</sup> as a typical big antitrust case. Its inflated transcript reflects

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165, 167-68, 171-79 (1950). Judge Yankwich's information as to *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952), however, is not correct. Plaintiff's case took about ten and one-half court days and defendants' case took about twelve and one-half court days. These times included opening statements and arguments at the end of plaintiff's case. During the recess between the plaintiff's and the defendant's cases, the presiding judge held court in another part of the state.

From January 1, 1935 until January 1, 1950, only 85 government antitrust cases out of 600 filed were actually tried. See Yankwich, *supra* at 166. In the past 20 years, about three out of four government civil antitrust cases have been terminated without trial. See REPORT OF STAFF OF ANTITRUST SUBCOMM., HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., CONSENT DECREE PROGRAM (Comm. Print. 1959). The total of antitrust cases tried, whether private or government, is small compared with the number of antitrust cases filed. See Freund, *The Pleadings and Pre-Trial of an Antitrust Claim*, 46 CORNELL L. Q. 555 (1961).

In the 1950 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP., reference is made to nine cases in the federal district courts which lasted thirty days or more. Only one of the nine was an antitrust case, and five of the nine had more trial days than that one. For the years 1946-1948, it has been estimated that the median length of trial time for both government and private antitrust cases was five days. The average for 1947-1949, however, was considerably higher. 1950 REPORT, *supra* at 96-98, 114. In fiscal 1954, out of 119 cases tried for ten days or more, two were government antitrust cases and eight were private antitrust cases. In that year, 34 antitrust cases were filed. 1954 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP. 190-91. In fiscal 1957, out of 192 cases tried for ten or more days, fifteen were antitrust cases, one of which was a government suit. 1957 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP. 99, 204. In fiscal 1958, out of 31 antitrust cases, thirteen took ten or more days. 1958 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP. 190-91. In 1959, out of ten government antitrust cases tried, only two took over nineteen days. 1958 *Seminar*, 23 F.R.D. 319, 426 (1959).

For the years 1954 through 1958, 52 out of 152 antitrust cases tried in the federal courts took ten days or more for trial. During that same period approximately 943 cases tried in the federal courts consumed ten or more days in trial. Table C-8, 1954-1958 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP. Of all government antitrust cases tried from 1954 through 1957, only five lasted more than twenty days. 1957 *Seminar*, 21 F.R.D. 395, 419, 483 (1958); 1958 *Seminar*, 23 F.R.D. 319, 551 ff. (1959). A judge's discussion of protracted criminal cases did not include a reference to any antitrust case.

23. See note 22 *supra*.

24. REPORT, p. 3.

25. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

26. Cahill, *Some Recent Trends and Developments in the Anti-Trust Laws*, 1 RECORD OF N.Y.C.B.A. 201, 204 (1946). There might be added *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), with approximately 1,300 exhibits and almost 20,000 pages of printed record; *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952), with about 2,500 exhibits and over 7,000 pages of record; and *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951) with over 3,700 exhibits and a 5,200 page stenographic record.

27. 118 F. Supp. 621 (S.D.N.Y. 1953).

the predilection of the court to extract every particle of argument and fact.

Many of the recommendations contained in the *Report* and the *Handbook* had been used to some extent in big antitrust cases prior to publication of the *Report*, but there had been no coordination of practice in such cases by counsel or judges. The great virtue of the *Report* and the *Handbook* is that, by their prestige, they may serve as authoritative practice hornbooks for judges and practicing attorneys. The *Report* and the *Handbook* have encouraged the use of "short cut" devices.<sup>28</sup> Less may be said for the general approach of the *Report* and the *Handbook* and for some of their recommendations.

The emphasis of the *Report* was on rigidity in procedural steps which increases the difficulty of prosecuting antitrust cases. Such rigidity would multiply the obligations of counsel, particularly those of counsel for the plaintiff.<sup>29</sup> The philosophy of the *Report*, seemingly against many recent trends, was opposed to the pronounced trend toward relaxing strict exclusionary rules of evidence in antitrust cases.<sup>30</sup> Its philosophy made it difficult to effectuate the growing recognition of the importance of establishing the grounds for the terms of a judgment as well as proving a violation of the antitrust laws.<sup>31</sup>

The *Handbook*, admirable in many respects, contains a number of caveats, but its approach is much the same as that of the *Report*. Both assume a level of judicial competence, impartiality, patience, and firmness without arbitrariness which a number of judges do not maintain. In the hands of the latter, some of these rules and recommendations are

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28. See 1957 *Seminar*, 21 F.R.D. 395, 443 (1958).

29. A letter from H. E. Morison, the head of the Antitrust Division, to Judge Prettyman, February 18, 1952, expressed general approval of the *Report* and assured the cooperation of Antitrust Division lawyers. However, its several interpretations and qualifications suggest some internal misgivings. In a subsequent letter of June 4, 1952 to Judge Prettyman, the head of the Antitrust Division said, "I feel that the recommendations of the Conference in these and other matters can do much to further the expeditious and efficient handling of antitrust cases provided they are not applied in such a manner as to preclude the plaintiff from proving the facts essential to establish his case." 1957 *Seminar*, 21 F.R.D. 395, 547 (1958).

30. *E.g.*, *United States v. E. I. du Pont de Nemours & Co.*, 10 F.R.D. 618 (D. Del. 1950); *United States v. Shoe Machinery Corp.*, 89 F. Supp. 349 (D. Mass. 1950); Dession, *The Trial of Economic and Technological Issues of Fact*, 58 *YALE L. J.* 1019, 1243 ff. (1948); Note, 46 *ILL. L. REV.* 915 (1952); Marcus, *The Supreme Court and the Antitrust Laws, 1947-1948*, 37 *GEO. L. J.* 341, 366 ff. (1948). See also note 145 *infra*.

31. See Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 *RECORD OF N.Y.C.B.A.* 59, 68-69 (1952); Marcus, *Patents, Antitrust Law and Antitrust Judgments Through Hartford-Empire*, 34 *GEO. L. J.* 1, 36 ff. (1945); Note, 97 *U. OF PA. L. REV.* 234 (1948).

likely to become very oppressive,<sup>32</sup> particularly to the extent that a rule or recommendation bears more heavily upon one side than upon the other.

The antitrust laws represent one of the basic thrusts of economic policy in the American scene. Congressional policy has seen fit to provide for appeals directly to the Supreme Court in government civil antitrust cases,<sup>33</sup> to provide for special expediting courts in the more important government antitrust cases,<sup>34</sup> and to facilitate the use of private antitrust suits in enforcing the Sherman Act by making available judgments secured in government antitrust suits as prima facie evidence in private suits.<sup>35</sup> Congress has expressly directed that the taking of depositions in antitrust cases be open to the public.<sup>36</sup> The courts have allowed the validity of patents to be attacked when invalidity would vitiate a defense to charges of antitrust violations, even though traditional rules of estoppel would normally prevent such attack.<sup>37</sup> It would seem, therefore, that a proper test to apply to proposed recommendations or rules for the trial of an antitrust case would be: Do they facilitate the enforcement of the antitrust laws without unfairness or, alternatively, do they expedite the disposition of an antitrust case without unfairness and without impeding or endangering the enforcement of the antitrust laws?<sup>38</sup>

The policy considerations relating to effective enforcement receive

32. All practicing attorneys have their judge-made chamber of horrors. The Antitrust Bar is no exception. In this writer's book of memories there are a number of such horror stories—some personal, some a matter of record, some told him by members of the bar or judges. For a difference in attitude of judges, see 1958 *Seminar*, 23 F.R.D. 319, 420, 435 (1959); Tolman, *The Administration of the Federal Courts: A Review of Progress During 1950-1951*, 38 A.B.A.J. 127 (1952); Hadley, *Bias and Prejudice or the Case of the Seven Bishops*, 32 B.U.L. Rev. 265 (1952); Medina, *Judicial Administration and the Law Schools*, 40 Ky. L. Rev. 359, 362 (1952); [Sept. 1952] Rep. of the Standing Comm. on Fed. Judiciary, A.B.A. Advance Prog. 32 ff; Marx, *Justice is Expensive*, 36 J. AM. JUD. SOC. 75 (1952); Cedarquist, *The Need for Judicial Reform in Illinois*, 2 DEPAUL L. REV. 39 (1952). Cf., *Spector v. United States*, 193 F.2d 1002 (9th Cir. 1952).

The Judicial Conference acknowledged the strong feeling on the part of the Department of Justice representatives that firmness of limitation was exercised against it and not against private parties and at the same time acknowledged strong protests of the opposite sort from private parties. REPORT, p. 7.

33. 62 Stat. 989 (1948), 15 U.S.C. 29 (1958); 28 U.S.C. 1253 (1958).

34. 63 Stat. 107 (1949); 15 U.S.C. 28 (1958).

35. 69 Stat. 283 (1955); 15 U.S.C. 16 (1958).

36. 37 Stat. 731 (1913); 15 U.S.C. 30 (1958).

37. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947).

38. An attorney who has been prominent both in government service and as counsel for antitrust defendants, after adducing how complex a big antitrust case may become, has said: "In fairness to the Government, it should be pointed out that the framing of the scope of cases properly lies within its sound discretion and that it is not wise to fetter this discretion by rule or otherwise." Cahill, *Some Recent Trends and Developments in the Antitrust Laws*, 1 RECORD OF N.Y.C.B.A. 201, 204 (1946).



no acknowledgment in the *Report* or in the *Handbook* of the Judicial Conference. The recommendations in the *Report* and the *Handbook* are likely to be interpreted according to their tone. In view of their wide distribution, the absence of an *expression* of concern in them for the achievement of a just and proper result in a particular case leaves much to be desired.<sup>39</sup>

Before embarking upon an analysis of the recommendations in the *Report* and the *Handbook*, it is well to emphasize that criticism by the writer is often directed not to the device suggested, but to the recommended rigidity of its use.

### PRETRIAL PROCEDURE

Much of the subsequent emphasis that developed from the *Report* was with respect to pretrial proceedings,<sup>40</sup> an emphasis which this writer believes is justified. Such emphasis, however, lends itself to abuse when used to sacrifice substance to procedure or the needs of

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39. Thus, in the Investment Banking case, *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), in discussing a proposed modification of a pretrial order sought by the Government, defendants' counsel sought to prevent the change to the marked detriment of the Government, by reference to the *REPORT* of the Judicial Conference. Record, p. 5507, 5519, *United States v. Morgan*, *supra*. For an example of rigidity by a lower court which promoted expediency at the expense of justice, see *Russell-Milling Co. v. Todd*, 198 F.2d 166 (5th Cir. 1952), where the court had to reverse a holding by a master and district court in which a plaintiff had been considered bound by a stipulation of facts which was entered into by plaintiff's counsel by mistake, the mistake apparently being known by defendant's counsel. See also *Fernandez v. United Fruit Co.*, 200 F.2d 414 (2d Cir. 1952), *cert. denied*, 345 U.S. 935 (1952); *Olsen v. Shinnihon Kisen, K.K.*, 25 F.R.D. 7 (E.D. Penn. 1960). Also see note 72 *infra*.

In *United States v. E. I. du Pont de Nemours & Co.*, 10 F.R.D. 618 (D. Del. 1950), it appeared that pursuant to a pretrial order, the Government filed with the Clerk of the Court copies of documents on which it intended to rely, arranged and marked as exhibits in accordance with its proposed order of proof. The Government stated it was continuing its investigation and that additional documents might be offered. The defendants moved to strike all the exhibits or to compel plaintiff to file a list of exhibits not on the list. In denying this motion, the court said at 622:

Admittedly, the purpose of adopting pretrial procedural techniques in connection with the introduction of mass documentary proofs in antitrust cases is not only laudable but necessary in view of the gargantuan dimensions current antitrust litigation is assuming. In reducing the time element of trial and crystallizing supporting proofs for the trial judge's consideration, careful attention, however, must be given that innovations in this field should not be designed to deprive government counsel—or defense counsel—of the right within reasonable bounds, to control the preparation and presentation of their respective cases.

This approach is to be contrasted with that taken by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, 93 F. Supp. 190 (D. Mass. 1950), where, in addition to excluding numerous exhibits at one stage, he also required the Government to select the 300 documents considered by them to be the most important. It is worth noting that counsel in the *Investment Banking* case, *supra*, and *United States v. E. I. du Pont de Nemours & Co.*, *supra*, who sought a strict rule of limitation upon the Government's presentation of its case, were among the authors referred to in note 9 *supra*.

40. *E.g.*, Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55 (1957); 1957 *Seminar*, 21 F.R.D. 395 (1958); 1958 *Seminar*, 23 F.R.D. 319 (1959).

a particular case to an inapt uniformity of procedure.<sup>41</sup> The *Handbook*, particularly in its Appendix, presents a set of guides for pretrial proceedings which, except in a few instances, promotes—if its spirit as well as its letter is followed—a high degree of utility for pretrial proceedings without endangering a just determination of the cause.

Judges differ as to whether a reporter should record pretrial proceedings.<sup>42</sup> The *Handbook* recommends that the initial pretrial conference be without the presence of a reporter.<sup>43</sup> This writer prefers to have one present. A transcript avoids differences between counsel as to what took place at such hearings, and may be important with respect to matters which come up later—before the trial, at the trial, or on appeal. The appropriate use of an “off the record” discussion is available when desirable.

#### ANALYSIS OF THE EXPEDITING DEVICES RECOMMENDED IN THE REPORT AND HANDBOOK<sup>44</sup>

*Identification of the Big Case.* The *Handbook* contains a valuable discussion on identification of the “big” case, and antitrust suits are singled out for special attention. It is hoped that its caveats will receive the attention they deserve.<sup>45</sup>

*Necessity of Complete Preparation.* The *Report* asserts the necessity of complete preparation on the part of all participants. It points out that a task of the trial judge in a “big case” is to make certain, before setting the case for trial, that counsel are completely prepared and have efficiently organized their material. There is much to be said for this

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41. See McDowell, *Pretrial Procedures: Pretrial v. Procedure*, IV ANTITRUST BULL. 675 (Sept.-Oct. 1959). And see 1957 *Seminar*, 21 F.R.D. 395, 559 (1958). Local pretrial rules, lacking uniformity, are sometimes quite inappropriate for a protracted antitrust case. In an antitrust case in the Western District of Pennsylvania several years ago, counsel for the Government and New York counsel for the defendant were in agreement as to the handling of documents and other matters. Local counsel for the defendant, however, pointed out that the procedure agreed upon was inconsistent with the local pretrial rule. Considerable argument took place before the court before a pretrial order adopting the proposed procedure was entered.

In some courts, an initial formal pretrial notice requires certain things to be done by the parties prior to the pretrial conference. Antitrust counsel might shudder at one provision in such notice from the middle District of Alabama: “Attorneys to be fully prepared to state the facts of the case in the most minute detail and to admit all the facts that are true.” Cf., *Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37, 141-42, 171-72 (1961). The *HANDBOOK* should have the effect of promoting more uniformity in this respect. See notes 65 and 211 *infra*.

42. See *Seminar*, 20 F.R.D. 485, 526 ff. (1958); 1958 *Seminar*, 23 F.R.D. 319, 596 (1959). Cf., 1957 *Seminar*, 21 F.R.D. 395, 411-12, 494-95 (1958).

43. *HANDBOOK*, p. 21.

44. Although the writer will comment on many of the recommendations in the *Report* and the *HANDBOOK*, no attempt will be made to analyze all of them.

45. But cf., *Metropolitan Theatre Co. v. Warner Bros. Pictures*, 12 F.R.D. 516 (S.D.N.Y. 1952).

approach, although it is hardly consistent with the *Report's* leanings toward curbing discovery proceedings. The same approach might well be taken as to cases which have been set for trial. In either event, dilatory tactics should not be rewarded by postponement of the trial date if the other side is ready.

*Statement of Issues and Discovery.* Antitrust complaints more often suffer from too much rather than from too little verbiage. For a while a number of judges in the District Court for the Southern District of New York applied a strict rule of pleading to complaints in private antitrust cases requiring them to meet higher standards than in other cases. This trend was halted to some extent by an opinion<sup>46</sup> of Judge Clark, speaking for the Court of Appeals for that circuit, but harmony on this point still seems to be lacking.<sup>47</sup>

The Antitrust Division of the Department of Justice and private antitrust plaintiffs are often seriously hampered by not having subpoena or discovery powers prior to the filing of a suit. They are not even available on application to the courts.<sup>48</sup> A troublesome problem is the extent to which grand jury proceedings should and can be used to procure evidence for the purposes of filing civil antitrust suits.<sup>49</sup> Under the present state of the law it would seem that if grand jury proceedings were instituted with the intent to bring criminal proceedings, if the evidence so warranted, a civil suit brought by the Government would not suffer the penalty of being under a disability therefor; but, if there were not such genuine intent, disability might attach to the civil suit.<sup>50</sup> And even if a criminal suit is brought after grand jury proceedings, in a later civil suit, private antitrust plaintiffs may be denied the benefit of such grand jury discovery.<sup>51</sup> A request to a prospective defendant to examine its files may result in complete cooperation. On the other hand, it may result in a flat refusal; or in permission to examine certain files, but not

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46. *Nagler v. Admiral Corp.* 248 F.2d 319 (2d Cir. 1957).

47. See Freund, *The Pleading and Pre-Trial of an Antitrust Claim*, 46 CORNELL L.Q. 555, 556-58 (1961); *Padorani v. Bruckhausen*, 293 F.2d 546, 551 (2d Cir. 1961).

48. One antitrust defendant's counsel's understanding of the problems of a plaintiff in preparing an antitrust case has led to the somewhat exaggerated statement: "The only real preparation of a case can arise after the complaint is filed." *Hearings on H.R. 3408 Before a Subcommittee of the House Committee on the Judiciary*, pt. 3, 82nd Cong., 1st Sess. 38 (1951). See Baldrige, *Simplifying and Expediting Cases*, [1951] C.C.H. SYMPOSIUM ON BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 27.

49. See *United States v. Proctor & Gamble*, 356 U.S. 677 (1958); *In re Grand Jury Investigation of the Aviation Insurance Industry*, 1960 Trade Cas. ¶ 76723 (S.D.N.Y. 1960).

50. *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960).

51. Application of State of California to Inspect Grand Jury Subpoenas (E.D. Pa. M-2261, Decision of May 11, 1961), now on appeal in the Court of Appeals for the Third Circuit.

others; or, a reply may be received from a prominent law firm that it represents the company whose files the Government desires to search and that it will be glad to review the files and select documents in which it believes the Government will be interested. In one instance in recent years, the government investigators by accident found relevant documents in trash cans in the back alley of the company being investigated. All this is discovery in reverse.

The writer is not aware of the filing of a government antitrust suit where there was not sufficient knowledge of facts to warrant an honest belief that a violation of the Sherman Act existed. In a number of cases, however, the scope of issues and many of the probative facts became known to the plaintiff only some time after the filing of the complaint.

The *Report* takes the position that, no matter what the objection or difficulty, specification of issues should be required after the filing of the complaint. Such particularization is to be achieved by informal conferences between judge and counsel well in advance of a possible trial date. These issues are to be incorporated in an order of the court which should control proceedings thereafter as Rule 16 of the Federal Rules of Civil Procedure provides. The *Report* admits that it sometimes happens that issues cannot formally and finally be fixed prior to processes of discovery. However, it asserts that conferences as to issues should be had prior to the beginning of discovery proceedings; the issues indicated or known at that point should be framed and stated, and they should serve as the basis for the bounds of permissible discovery.<sup>52</sup>

Elsewhere in the *Report*,<sup>53</sup> it is stated that discovery process must necessarily be held to the scope of the judge's program for the case as developed by him in conference with counsel.<sup>54</sup> The *Report* apparently is primarily concerned with issues of fact rather than issues of law.<sup>55</sup> The

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52. See 1958 *Seminar*, 23 F.R.D. 319, 393, 407, 416 (1959).

53. *REPORT*, p. 37-38.

54. In the face of this position, it is difficult to ascertain what vitality is left to the statement, "The Rules of Civil Procedure relating to discovery are, of course, to be given the widest meaning and effect, and the processes of discovery there provided are in the nature of an investigation." *REPORT*, p. 9. It has been said that the *REPORT* puts discovery in a new position in the "big case." "The processes of discovery will be used only if the trial judge is convinced that they will serve a useful and proper purpose in the enterprise." McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A.J. 289, 291 (1952). This also seems to have been the approach of the 1954 A.B.A. *REPORT* at 22-23. Cf., *Zenith Radio Corp. v. Radio Corp. of America*, 106 F. Supp. 561 (D. Del. 1952). There has been some retreat from this extreme position, but the retreat has not gone very far. See 13 A.B.A. *SECT. ANTITRUST REPORT* 191 ff. (1958).

55. It has been said that the *REPORT*, "would have complaints in antitrust cases allege facts upon which the violation charged is based and the trial proceed on those issues alone." Book Review, Loos, 20 *GEO. WASH. L. REV.* 366 (1952). It may be doubted that the *REPORT* goes so far but it would be difficult to argue that such analysis

emphasis is not, however, on having an antitrust case decided on issues which the evidence supports or on facts which should be available to the court at the trial through voluntary or involuntary discovery, but on limiting the issues and facts which might be available.<sup>56</sup> Thus, if the complaint charges violations respecting patents in a certain field, and at the time of pretrial conference the Government counsel in the absence of discovery confesses that his knowledge is limited to restrictions as to two fabrics, the Government and the public may be deprived of an opportunity of removing restrictions of these same patents on other fabrics which discovery might show were subject to similar restraints. It is no answer to suggest an entirely new investigation and a new suit.<sup>57</sup> The *Handbook* is much less dogmatic on this score, but its reference to re-

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has no support in the REPORT. Cf., *Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc.*, 12 F.R.D. 516 (S.D.N.Y. 1952).

56. This emphasis has been interpreted by one writer, associated with a law firm commonly appearing for antitrust defendants, as meaning that the court should be iron-hearted toward the plaintiff, and the issues frozen in a pretrial order. Discovery by defendants against plaintiffs to achieve this deep freeze is advocated at the same time that limitations on the use of discovery by plaintiffs against defendants is praised. McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A.J. 289, 290-91 (1952). That defendants, in supporting rigidity, are less concerned with expedition than with hampering plaintiffs may be surmised. In the *du Pont* case, 10 F.R.D. 618 (D. Del. 1950), although the original pretrial order stated plaintiff would not challenge the validity of the defendants' patents in its case in chief, reserving the right to do so on rebuttal if the defense should rely upon patent rights, the order directed the plaintiff to furnish to defendants' counsel a list of defendants' patents, the validity of which plaintiff challenged, with a list of the prior art relied upon. It took several applications before another judge (who tried the case) for the Government to be relieved from this onerous, time-consuming requirement. As the case developed at the trial, the validity of patents did not become an issue.

The attitude of a federal judge in the third circuit was expressed as follows: "And finally, it is asking too much to expect a complete clarification of the issues in a complicated case from one or even two pretrial conferences, perhaps held under the pressure of time. The pretrial conference has its value, but it should be combined and integrated with discovery procedure as a part of a single mechanism." *Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131, 164 (1952). This is to be compared with the attitude of a justice of the Court of Appeals for the District of Columbia: "It is to say that the investigatory process is not part of the judicial function, except insofar as a grand jury is considered part of the judicial function." Baldridge, *Simplifying and Expediting Cases*, [1951] C.C.H. SYMPOSIUM ON BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 37.

57. See note 72 *infra*. In *United States v. American Radiator & Standard Sanitary Corp.*, Civil No. 14469, W.D. Pa., 1958, emphasis upon an early fixation of issues and the desire of the court to limit the issues led to truncated discovery proceedings, a long pretrial record of controversy inviting appeal, and the preclusion of discovery of data which should have been elicited for the proper determination of the probable effect of the merger. The importance of those issues had become apparent to the Government only after the start of discovery proceedings through documents uncovered in defendant's files. This took place at a time when counsel for the defendant considered those issues within the complaint. A change of defendant's counsel brought a different point of view. This case was settled by a consent judgment. For an interesting case of the uncovering of a new issue through discovery, see *Nycoseal, Inc. v. Parke Davis & Co.*, 28 F.R.D. 24 (S.D.N.Y. 1961). See also Frost, *The Ascertainment of Truth by Discovery (Seminar on Practice and Procedure)* 28 F.R.D. 89, 96 (1961).

strictive statements from several sources, including the *Report*, seems to give support to any position a district court judge might take.<sup>58</sup> Moreover, the *Handbook*, like the *Report*, treats delimitation of the issues in the context of discovery proceedings.

It may be that the writers of the *Report* were unduly influenced by the frontal attack by defense attorneys upon the use of discovery proceedings by plaintiffs in antitrust cases.<sup>59</sup> It can hardly be gainsaid that in a number of government cases discovery proceedings have played a large part in putting them in the "won" column. It is also true that the trial of some of the government's antitrust cases have been greatly shortened by discovery proceedings.<sup>60</sup> These considerations might not appeal to defendants. They should appeal to the public. The consensus of informed opinion favors the liberal use of discovery proceedings to bring both issues and facts into focus for examination by the courts.<sup>61</sup> They were designed to supplement pleadings where knowledge was incomplete as well as to facilitate trial on the merits of the relevant facts. It would be regrettable if the *Report* were to establish a contrary trend in "big cases" where discovery proceedings are so often of great importance.

The *Handbook* is no less restrictive on the plaintiff with respect to

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58. See *HANDBOOK*, pp. 22 ff.

59. E.g., *A Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131, 140, 142-45 (1952); McAllister, *supra* note 56; see Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55, 62-64 (1958).

A study of the use of discovery in the federal courts has been said to reveal that antitrust cases do not bulk large enough in number to show up in such a study. *Symposium, supra* at 134.

60. Cf., *Symposium, supra* note 59 at 135. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1947), the use of discovery procedure enabled the Government to put in its case in three days. Abuse of discovery proceedings is more likely to be indulged in by defendants than by plaintiffs. See *Symposium, supra* note 59 at 132-40. The study therein shows that depositions were probably used more often by defendants than by plaintiffs, and this has been the writer's experience in antitrust cases. The extensive use of depositions at the demand of defendants in a previous case was advanced by the Government as a cause for its delay in bringing the *Ford* case to trial. *Government Brief in Ford Motor Co. v. United States*, 335 U.S. 303 (1948).

61. See *Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131, (Speck) 132 ff., (Willis) 160 ff., (Bard) 152 ff.: "Pre-Trials are valueless unless there has been liberal use of discovery, or unless there has been a free voluntary exchange of information which is frequently given now because of the discovery provisions in the federal rules. . . . Discovery has aided counsel on both sides in giving a clearer presentation of the facts to the jury at the trial. Discovery has been a material factor in producing just results in law suits." *Symposium, supra* at 153. See also 1950 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP. 73. A poll of antitrust lawyers in 1957 on the question, "Would you favor postponing discovery until the issues have been clarified at pretrial"? evoked a two to one negative response. 1957 *Seminar*, 21 F.R.D. 395, 496 (1958). In some district courts, pretrial rules prescribe completion of all discovery before pretrial. See *Seminar*, 28 F.R.D. 37, 140 (1961). As to some of the problems involved in discovery proceedings, see Freund, *supra*, note 47 at 561 ff.

discovery.<sup>62</sup> The *Handbook* acknowledges that frequently private plaintiffs and the Government are not sufficiently aware of the facts to permit precise definition of issues prior to discovery of defendant. Nevertheless, there is to be filed a tentative statement of issues and, after an interval, discussion is to be had at a pretrial conference for limiting discovery.<sup>63</sup>

Discovery is to be stayed pending a pretrial conference hearing. Discovery is to be confined to the genuine issues necessary to a decision of the case. If preliminary discovery is required to enable parties to discuss definitions of issues, such discovery is to be specifically programmed. Discovery is to be in accordance with the bounds established in tentative statements of issues to be filed from time to time. As such discovery progresses, the tentative statements of issues may be modified and discovery sought in accordance with the modified statement. The filing of a statement of issues is to be followed, after an interval of time has elapsed, by a pretrial conference to consider limitation of discovery. "This is not to suggest that the efforts of the trial judge should be directed *entirely* to cutting down on discovery."<sup>64</sup> In view of the approach evidenced by the above statements, there is a touch of incongruity to find tucked away in an introductory part of the *Handbook* the statement that "parties in a protracted case should have no lesser rights in this respect [broad discovery] than those in less complex cases."<sup>65</sup>

To the writer it seems clear that under the current approach to discovery, the parties to big cases are denied the full benefit of the Federal Rules of Civil Procedure on discovery. That such rules were designed to be liberally construed so as to elicit the facts upon which a just result might be obtained, and to eliminate "trials by surprise," is universally recognized. It is one thing to encourage resort to the courts to prevent abuse of the discovery rules. It is quite another thing to encourage the courts to prevent one from having the full benefit of the rules by restricting their use. It is also believed that piecemeal discovery is likely to be more dilatory than discovery under the Federal Rules. The possibility of more paper work, more conferences, and more out of town trips is a very real one. It invites objections by counsel for defendants who gladly receive the guerdon of limitation of issues and limitation of discovery.

One very practical trouble with delaying discovery proceedings until

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62. See HANDBOOK, p. 22; Appendix 4, 8, 9, 11-13, 17-20, 37-38.

63. HANDBOOK, p. 28.

64. HANDBOOK, p. 28. (emphasis added.)

65. HANDBOOK, p. 2.

either final or tentative fixation of the issues is the ultimate delay that is likely to ensue. Production of documents on the part of the defendants or their attorneys may take a long time; time schedules for examining documents have to be worked out, and the answering of interrogatories may be delayed. A delay in the beginning of the discovery process may have the consequence of an unnecessarily long delay before the case is in position for a trial date to be fixed.<sup>66</sup> The position of the *Report* and the *Handbook* on this matter has not received unanimous support. Since the time of the *Report*, there has been considerable controversy over having discovery await fixation of issues and with respect to shifting of control over discovery from counsel to the court. There has been some trend in that direction, but not to the extent hoped for by the proponents of rigid rules of discovery in antitrust cases.<sup>67</sup> It may be noted that discovery may have the effect of dropping out issues.<sup>68</sup>

The *Report* devotes some space to the contention that in civil antitrust cases, the Government files vague complaints because it lacks inquisitorial powers. It may be seriously questioned whether antitrust complaints are so vague as to justify the attention the *Report* gives to particularization of issues.<sup>69</sup> The normal antitrust complaint, contrary to the canons of good pleading, pleads many facts. This may be done to help the court or the defendants or even, perhaps, to influence the court's thinking or to secure a favorable public reaction. On page three of the

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66. Where there are several defendants located in different parts of the country, this kind of scheduling may not be an easy task. The plaintiff's attorneys may, at times, be asked to look at the documents in the office of the defendants' attorneys which may, in turn, mean that said attorneys want to have an opportunity to look them over to ferret out privileged documents, etc., before turning the documents over to counsel for the plaintiff. In one case with which the writer was associated, examination of documents of one defendant took place at about five different times because of difficulties of collecting documents and the effect of rulings of the court on objections, etc. The availability of the court to hear objections of counsel is among the intangibles which make it advisable to start discovery processes as soon as possible. And the more this process has to be gone through, the greater the chances for delay. For an example of delay after discovery had been stayed, see *Leopard Roofing Co., Inc. v. Asphalt Roofing Industry Bureau*, 1961 Trade Cas. ¶ 75302. (E.D. Tenn. 1960).

67. *United States v. Standard Oil Co. of New Jersey*, 1959 Trade Cas. ¶ 76044 (S.D.N.Y. 1959); *United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960). See 1954 A.B.A. REPORT at 18-21; 1957 *Seminar*, 21 F.R.D. 395, 408, 416-17, 507, 510, 577 (1958); 1958 *Seminar*, 23 F.R.D. 319, 364-65, 615 (1959). See notes 59, 61 *supra*.

68. See 1958 *Seminar*, 23 F.R.D. 319, 458 (1959).

69. It is this writer's experience, moreover, that discovery in antitrust cases is used at least as often, and probably more often, to secure proof than to find or expand issues.

*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), has become a landmark in antitrust law. The chief trial counsel for the Government in that case has noted that virtually none of the many thousands of documents procured by subpoena from the defendant had been seen by the plaintiff prior to that time. See Rice, *Trial Technique in Antitrust Cases*, 7 LAW AND CONTEMP. PROB. 138, 142 (1940).



*Report*, reference is made to a number of "big" antitrust cases in which the complaints or indictments were of great length.<sup>70</sup> It is worth noting that indictments where grand jury investigative proceedings have taken place have been attacked for vagueness as often as the complaints where judicial investigative weapons have not been available. The attacks are generally unsuccessful.<sup>71</sup> It should also be noted that, more often than not, motions for more definite statements are denied in antitrust cases. It is believed that such motions are brought as often for dilatory purposes as for clarification. At any rate, when granted, they are a testimonial to the courts' resources available for the protection of defendants. With respect to criminal cases, a defendant has available motions to dismiss as well as motions for bills of particulars. The writer is unaware of any case in the appellate courts where a defendant after trial was considered to be unduly prejudiced by the vagueness of an antitrust complaint or by unexpected issues.

The *Report's* approach in this matter is in strange contrast to its admonition that the trial of a big case should be postponed until the court is convinced that the case has been fully prepared. Full preparation on an issue of slight importance or on one the plaintiff thinks he is likely to lose is small comfort to the plaintiff or the public for the loss of an issue of greater importance or one more obviously violative of the Sherman Act.<sup>72</sup>

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70. *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S.D.N.Y. 1941), 65 printed pages; *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946) 33 mimeographed pages; *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 974 (S.D. Cal. 1941), 125 mimeographed pages; *United States v. Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio 1942), 100 printed pages; *United States v. Imperial Chemical Industries*, 105 F. Supp. 215 (S.D.N.Y. 1952), 125 mimeographed pages; *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), 56 printed pages; *United States v. Libby-Owens-Ford Glass Co.*, 10 F.R.D. 346 (N.D. Ohio 1951), 82 printed pages; *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), 25 mimeographed pages; *United States v. United Shoe Machinery Corp.*, 93 F. Supp. 190 (D. Mass. 1950).

In *Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc.*, 12 F.R.D. 516 (S.D.N.Y. 1952), the plaintiff's fifty-five page antitrust complaint was stricken and he was ordered, among other things, not to plead "unnecessary evidence."

71. *United States v. American Medical Ass'n*, 110 F.2d 703 (D.C. Cir.), *cert. denied* 308 U.S. 599 (1940); *Frankfort Distilleries Inc. v. United States*, 114 F.2d 824 (10th Cir. 1944), *rev'd on other grounds*, 324 U.S. 293 (1945); *United States v. Armour & Co.*, 137 F.2d 269 (10th Cir. 1943); *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942); *American Tobacco Co. v. United States*, 147 F.2d 93 (6th Cir. 1944); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923); *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923). See Yankwich, "*Short Cuts*" in *Long Cases*, 13 F.R.D. 41, 43-44 (1952).

72. For the finality courts have given to pre-trial orders, see Annot., 22 A.L.R. 2d 599 (1952). See also *Associated Beverages Co. v. P. Ballantine & Sons*, 287 F.2d 261 (5th Cir. 1961); *First Nat'l Bank in Greenwich v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961); *Link v. Wabash Railroad Co.*, 291 F.2d 542 (7th Cir. 1961); *Fernandez v. United Fruit Co.*, 200 F.2d 414 (2d Cir.), *cert. denied*, 345 U.S. 935 (1952); *Sher v. DeHaven*, 199 F.2d 777 (D.C. Cir.), *cert. denied*, 345 U.S. 936 (1952); *Isthmian Steamship*

The approach adopted by the *Report* and the *Handbook* could well impair the enforcement of the antitrust laws by encouraging prospective defendants not to allow their files to be examined prior to the filing of a complaint. It is hardly an answer for the *Report* to suggest that the Department of Justice should ask Congress for compulsory investigative powers.<sup>73</sup> The courts also have a responsibility to enforce the antitrust laws with weapons presently available. The *Report* might well have encouraged the courts to request, to the extent feasible, particularization of issues where this seemed really necessary without encouraging them to fix a status quo, tentative or final<sup>74</sup> (before trial and before discovery proceedings), for a case of public interest.<sup>75</sup> The trial courts are in full possession of means to prevent defendants' being surprised at a trial by new issues. It is to the credit of the judiciary that most judges have continued to be flexible in this respect.

Where there are a number of plaintiffs or defendants, the *Handbook* recommends that all should join in a single set of interrogatories; except to the extent the separate interest of a party may require a separate interrogatory, which should then be included within the single set.<sup>76</sup> This helps relieve a party from receiving successive sets of interrogatories,

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Co. v United States, 191 F. Supp. 338 (S.D.N.Y. 1961). See note 41 *supra*. They are subject to amendment. They may have the effect of adding issues. Owen v. Schwartz, 177 F.2d 641 (D.C. Cir. 1949). At least one appellate court has refused to reverse a case which was decided on an issue tried by the lower court without objection although not included in the pre-trial order. Harris v. Harris, 196 F.2d 46 (D.C. Cir.), *cert. denied*, 344 U.S. 829 (1952). Courts hardly deserve merit badges for excluding something of substance at a trial merely because reference was not made to it prior to the trial. Yet as realistic a judge as Judge Yankwich thought it worthwhile to bring out that in Richfield Oil Corp. v. United States, 343 U.S. 922 (1952), he had refused to allow the Government to present testimony as to defendants' relationship with a fourth group of stations by a strict construction of the pleadings and interrogatory proceedings. *A Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131, 167 (1952); Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 45-46 (1952). This apparently had the result of shortening the trial but may well have left an issue up in the air which could have been tried with considerably less effort and time than if made the subject of a new suit, and may well have jeopardized the adequacy of any judgment entered in the case. In most instances, of course, considerations of time, expense and manpower will preclude the possibility of a separate suit with respect to issues not permitted to be tried in a case which, in all probability, has been pending several years before being reached for trial.

73. It may be noted that for a number of years, the Attorney General has asked Congress for such legislation, but without success.

74. "Tentative" by some judges, at least, is likely to be indistinguishable from "final."

75. One defendants' attorney has suggested that an early and strict fixation of issues in the Government's case against General Motors and du Pont might have precluded the case being decided on the basis of the Clayton Act. Withrow, *Defense Counsel's View of a Government Civil Antitrust Suit*, 1957 Seminar, 21 F.R.D. 395, 427, 436-37, 1958. Cf., *Maloy v. Bemis Bros. Bag Co.*, 283 F.2d 32, 39 (1st Cir. 1960) (desired issues apparently relinquished because of pressure from court).

76. HANDBOOK, Appendix 24.

similar or substantially similar to preceding ones, so spaced that the completion of the answers to one is the signal for commencing the answers to another. This recommendation may create some problem where different counsel for multiple parties vary in their diligence, their work loads, and their willingness to allow someone else to take the lead.

*Confidentiality Orders.* In order to encourage voluntary response to discovery proceedings, the *Handbook* goes very far in advocating protective confidentiality orders—not only as to discovery prior to trial, but also as to the use of results of discovery at the trial.<sup>77</sup> Normally, it will be a defendant who will seek such an order. There are limited instances when secrecy orders are proper,<sup>78</sup> but it is possible for the *Handbook* to be construed so as to encourage an area of secrecy beyond such instances and to promote the granting of broad orders of secrecy. The *Handbook* would make it difficult, if not impossible, for government attorneys handling one pending antitrust case from using various types of information obtained in another government antitrust case.<sup>79</sup> Such would hardly be in the public interest.<sup>80</sup> Such an approach is not consistent with the congressional encouragement to private plaintiffs to use government antitrust proceedings in their own antitrust suits, nor is it consistent with the legislative policy of open depositions in antitrust suits. In recent years, defendants in government cases have made wide claims of confidentiality which have been resisted by the Government with varying success.<sup>81</sup>

*Opening Statements and Briefs.* The *Report* recommends the use of opening statements. The *Handbook* is less enthusiastic. Where the trial judge has presided at several pretrials, they are correspondingly of diminishing utility in a non-jury case. Ordinarily, the value of such statements will vary in proportion to the extent of preparation by counsel.

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77. HANDBOOK, Appendix 26, 38-39.

78. The Government and defendants have at times agreed on such orders. See Freund, *The Pleading and Pre-Trial of An Antitrust Claim*, 46 CORNELL L. Q. 555, 573 (1961).

79. Recently, a battle over this problem arose in connection with two pending government antitrust cases. A compromise understanding between counsel avoided a ruling by the court.

80. See *In re Petroleum Industry Investigation*, 152 F. Supp. 646 (E.D. Va. 1957); *United States v. Standard Oil Co.*, Civil No. 3722, W.D. Ky., May 23, 1960.

81. *United States v. United Fruit Co.*, Civil No. 4560, D. La., March, 1957, *United States v. American Radiator & Standard Sanitary Corp.*, Civil No. 14469, W.D. Pa., 1958; *United States v. Driver-Harris Co.*, Civil No. 942-56, D.N.J., 1956; *United States v. Kennecott Copper Corp.*, Civil No. 147-231, S.D.N.Y. 1960; *United States v. Standard Oil Co.*, Civil No. 3722, W.D. Ky., May 23, 1960. In *Driver-Harris*, *supra*, and in *United States v. Lever Brothers*, Civil No. 135-219, S.D.N.Y., 1961, there was a contest among multiple defendants on this score. See in general, *Report of Sherman Act Subcommittee on Cost Data Problems in Sherman Act Cases*, 17 A.B.A. SECT. ANTITRUST L. 537 ff. (1960).

Opening statements should not be allowed to become talkathons.<sup>82</sup>

One may readily agree with the *Report* and the *Handbook* that a brief before trial does help expedite the trial of a big case and is desirable. It is the writer's belief that such briefs are most effective when comparatively short, but this effectiveness may depend upon whether the court desires an analysis of documents before trial. It is believed that the better practice is to serve such a brief on the opposite party, and this has been the practice of the Antitrust Division.<sup>83</sup> Ordinarily a court will be glad to receive a pretrial brief even though not requested. Where it is believed that evidence problems may arise at the trial, and pretrial has not disposed of such matters, it is helpful to have a general discussion in the brief of the principles of law applicable to such evidence problems. This may facilitate rulings by the court during the trial, may avoid some objections, and may result in agreement by the parties at the opening of the trial as to admissibility of particular items or of a proffered line of evidence. It may also put the court in a position to make broad rulings when the trial begins.

*Handling of Documents.* The *Report* and the *Handbook* recommend that the parties be required to exchange proposed exhibits before trial. In practice, exchanges of documents before trial may be a continuing process of several exchanges, and it may be advisable to set several dates at which exchanges are to be made. This is helpful procedure as long as it is not used to bar the use of additional documents at the trial.<sup>84</sup> It

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82. In the Investment Banking case, *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), 66 days were consumed in opening statements—a period longer than the trial of the average big antitrust case. One defendant's counsel, who has written on the "Big Case," spoke for 16 days. Government counsel formally objected to the lengthy opening statements and to treatment of evidence piecemeal.

83. See Special Committee, *Streamlining the Big Case*, 13 A.B.A. SECT. ANTITRUST L. 183, 204 (1958); 1954 A.B.A. REPORT 36. Antitrust Division attorneys file pretrial briefs more often than defendants' attorneys. Thus, in *United States v. Oregon Medical Society*, 95 F. Supp. 103 (D. Ore. 1950), and *Schine Chain Theatres, Inc., v. United States*, 334 U.S. 110 (1947), short pretrial briefs were filed by the Government, but not by the defendants. Of course, time and personnel considerations sometimes make it difficult to file a pretrial brief. Local court rules may require such briefs, but such rules are, at times, inept for the needs of the "big case." The *Handbook* is likely to promote the use of pretrial briefs.

84. In the *Oregon Medical* case, *supra* note 83, the plaintiff, some time before the trial date, showed the defendants' counsel more than a thousand documents which were marked at pretrial for identification. These were most of the documents offered by plaintiff, but during the trial of the case other documents were offered, especially in rebuttal, as the need arose. Defendants' counsel showed plaintiff's counsel some of their documents during the recess after completion of plaintiff's direct case, and others after the defendants' case began.

If, as it would seem, the court itself has a duty in cases of public importance to adduce evidence the parties neglect, Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1293 (1952), it is all the more important that evidence not be barred at the trial because of counsel's inadvertence, neglect, or even bad faith.

is not to be assumed that bad faith will prevail in such exchange or that a court could not deal with bad faith otherwise than by excluding relevant evidence. It may be noted that it is extremely difficult to determine what documents are going to be used on rebuttal. Surprise is a very legitimate consideration on rebuttal or cross examination which should not be dissipated by attempting to have the plaintiff turn over exhibits which might possibly be used at that stage of the case.

The use of the word "exchange" may or may not be meant to be synonymous with "show."<sup>85</sup> If permanent exchange is meant, the exchange may be a very expensive proposition for plaintiffs who generally offer most of the exhibits in an antitrust case. It would seem that an opportunity for observation or a temporary loan should suffice, unless the other party is willing to pay to have a set of proposed exhibits photostated or photographed.<sup>86</sup> Moreover, in many antitrust cases most of the plaintiff's exhibits come from the defendants' files. In such cases, the *Handbook* recommends that the offering party need not furnish copies of such documents if he identifies them so that a defendant can find them.<sup>87</sup> When a party proposes to use charts, tables, or compilations, it is helpful to submit copies of these items to counsel for the other side, and a court might well require the other side to check for accuracy and to notify opposing counsel of the results of such a check within a reasonable time.<sup>88</sup>

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The head of the Antitrust Division, in commenting upon this proposed recommendation, said:

The fullest benefit may be derived from this procedure if each side makes an effort in good faith to select 'for exchange' the exhibits that it intends to offer, with the understanding that additional exhibits may be offered if, as frequently happens, papers in the possession of one side or the other which do not seem important before trial, become important as the result of developments during the course of the trial. Such application of this recommendation would remove a temptation for each side to tender all documents to the other party regardless of their evidentiary value, thus retarding the trial rather than expediting it.

Letter from H. G. Morison to Judge Prettyman, February 12, 1952, reproduced in 1958 *Seminar*, 23 F.R.D. 319, 541 (1959).

In government antitrust cases it is common to provide by stipulation, embodied in a pretrial order, for examination prior to trial of documents intended to be used on trial. Not infrequently, express provision is made for the use of additional documents at the trial. See e.g., 1954 A.B.A. REPORT 112; 1958 *Seminar*, 23 F.R.D. 319, 634 (1959).

85. In one recent antitrust case, the parties agreed to "exhibit" to each other by a certain date all papers intended to be used at the trial and thereafter from time to time such additional papers concerning which it forms an intention of using. The stipulation provided that it was not intended that either party be estopped from or prejudiced in offering additional documents upon trial or hearing as the occasion may demand. *But cf.*, *Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 169 (1961).

86. Ozaliding of documents has been permitted.

87. *HANDBOOK*, Appendix 48.

88. See *Berger v. Brannan*, 172 F.2d 241 (10th Cir.), *cert. denied*, 337 U.S. 941 (1949). This has been provided for in a number of government antitrust cases by

The *Report* recommends the use of stipulations covering (1) identification and authentication of documents and (2) undisputed conclusions upon pleaded issues or conclusions not subject to justifiable dispute. The *Handbook* is even more comprehensive on this score.<sup>89</sup> Stipulations as to identifications and authentication of documents are helpful and not uncommon in big antitrust cases.<sup>90</sup> Stipulations as to facts have been used,<sup>91</sup> sometimes as an exhibit in a case;<sup>92</sup> but unfortunately, neither they nor stipulations as to conclusions of law are very common. Sometimes agreement as to descriptive identification turns out to be a matter of considerable difficulty. The closer to the heart of the case a matter appears, the more difficult it is to get counsel to agree on a stipulation. In addition, the greater the number of counsel involved in a case, the greater the difficulty in reaching any agreement at all. A carefully drawn escape clause will often facilitate agreement with respect to such matters.<sup>93</sup> Courts should encourage escape clauses in pretrial orders or stipulations concerning documentary proof so as to encourage counsel to attempt to be both discriminating and cooperative in the belief that inadvertence or bona fide change of plan will not be penalized because of a good faith attempt to expedite a case. The better pretrial orders contain such a clause.<sup>94</sup> It is the writer's experience that such clauses are

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stipulation or pretrial order. See 1958 *Seminar*, 23 F.D.R. 319, 634 (1959). Its utility is recognized in the *HANDBOOK*.

89. *HANDBOOK*, p. 56 ff.; Appendix 48 ff.

90. The stipulation may cover documents produced upon a deposition. In *United States v. Shubert*, Civil No. 56-72, S.D.N.Y., 1953, the counsel for the respective defendants confined their stipulation as to authenticity of such documents to those pertaining to their respective clients but did stipulate that the others came from deponent's files, and, that if interrogated, he would have testified the documents were what they purported to be.

91. *E.g.*, *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). In *United States v. National Football League*, Civil No. 12808, E.D. Pa., 1952, a stipulation as to interstate commerce undoubtedly expedited the case. See note 204 *infra*.

92. This was done in *United States v. Oregon Medical Society*, 95 F. Supp. 103 (D. Ore. 1950).

93. "Subject to the right of either party by proof offered at the trial to qualify, add to, or disapprove the following stipulated facts, and to the right of either party to contend that any of the facts herein stated are not relevant, competent or material as evidence in this case, it is agreed that for the purpose of this trial the facts herein stated shall be deemed true. Unless otherwise stated, the existence of any status referred to is at least since January 1, 1936, and up to the time of this stipulation." Preface to *Pretrial Stipulation of Facts in United States v. Oregon Medical Society*, note 92 *supra*. See also, Special Committee, *Streamlining the Big Case*, 13 A.B.A. SECT. ANTITRUST L. 37, 202 (1958).

94. Thus, in *United States v. Imperial Chemical Industries*, Civil No. 24-12, S.D.N.Y., 1950, Pretrial Order No. 1 provided:

The purpose of the foregoing paragraphs of this stipulation is to disclose before trial and produce at the opening of the trial as fully as possible the documentary evidence. It is not intended to preclude any party from offering

seldom resorted to at trial. They serve to give counsel confidence that any mistake of his or any over-reaching of opposing counsel will be rectifiable without arguments, the outcome of which depend upon a court's discretion. The *Handbook* recognizes this problem in a well expressed discussion of escape clauses.<sup>95</sup>

A sometimes preferable pretrial procedure is to offer documents for identification in the presence of the court reporter with opposing counsel noting he does not object to authenticity, subject to any proof to the contrary which may be adduced at the trial.<sup>96</sup> Particular documents may be challenged at the time of the offer or all objections other than authenticity reserved until the trial. The proponent may briefly describe each document offered, or merely ask the reporter to get up a transcript listing the documents with an appropriate description. Some reporters can do a better job of description than counsel. It may be wise, when there are a considerable number of documents, to ask the reporter to leave a blank column in the transcript to be filled in with the page of the transcript of record when the document is admitted. This same transcript may be added to as other documents come in during the trial or it may be confined to documents proffered for identification before trial. The *Handbook* recommends having documents marked for identification before trial.<sup>97</sup> If agreement on such matters is impossible or a process of procrastination ensues, counsel for one of the parties may get up a descrip-

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any further evidence should, for instance, the materiality or relevance of such documents be disclosed by the testimony of a witness called by an opposing party or should the document not be in the possession of the party desiring to offer it at the time of the preparation of the lists mentioned above, or should the documents be omitted from such lists by inadvertence. Therefore, without attempting to enumerate all proper grounds for offering such additional documentary evidence, such evidence may be offered and admitted upon reasonable notice and upon a showing satisfactory to the court that such offer is not inconsistent with the bona fide execution of this stipulation. This stipulation shall not be taken to preclude any party from cross-examining a witness upon any document or documents subject to rulings of the court.

A similar provision appears in a Supplemental Pretrial Order in *United States v. E. I. du Pont de Nemours & Company*, Civil No. 1216, D. Del., 1949. As to what may happen without such a clause, see *Hoepfner Construction Co. v. United States*, 287 F.2d 108 (10th Cir. 1960).

95. HANDBOOK, Appendix 49.

96. This was done in *United States v. Oregon Medical Society*, 95 F. Supp. 103 (D. Ore. 1950). In *United States v. United Shoe Machinery Corp.*, 93 F. Supp. 190 (D. Mass. 1950), documents were marked for identification before the clerk. See McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 42 (1950). In *United States v. Driver-Harris*, Civil No. 942-56, D. N.J., 1956, the bulk of the documents were marked for identification in the presence of counsel but not of the judge, before a court reporter. Additional documents were, with consent of counsel, marked for identification before a court reporter at counsel's office, without the presence of opposing counsel.

97. HANDBOOK, p. 57. See also 1957 *Seminar*, 21 F.R.D. 395, 489-90 (1958).

tive list of his documents before trial and give it to the court for its convenience during the trial.<sup>98</sup>

The determination of evidence problems may sometimes be facilitated by filing with the court as an exhibit a document entitled "Source Document." This consists of a page or less of symbols and corresponding references, *e.g.*, "A" equals John Doe Company's files. Counsel then places the appropriate symbol on the document intended to be offered.<sup>99</sup>

*Expert Testimony.* The *Report* suggests the exchange of "canned" expert testimony before trial. If counsel submits such testimony to opposing counsel who has no similar "canned" testimony, the later might well be required to inform the former what part of such testimony he expects to challenge and the grounds of the challenge. The *Handbook* explores the question of expert testimony at some length. It presents a number of suggestions on how to deal with this troublesome problem which defies a single satisfactory solution.

*Separation of Issues.* The *Report* suggests that often in a "big case" it is possible and desirable to break the case down into separate issues. The *Report* would require counsel to group exhibits according to the issues to which they pertain and identify the group with the issues. It is standard procedure for defendants' attorneys in antitrust cases to attempt to atomize a case, while it may be important to the plaintiff to have the part considered in the context of the whole case or with respect to its relationship with other parts. The Antitrust Division of the Department of Justice is on record with the Conference as stating that the plaintiff's case should be heard as a whole and that it would be a rare situation when the course of action suggested by the *Report* would be practicable. The cases have established the rule that antitrust cases should not be atomized.<sup>100</sup>

The Antitrust Division did agree, however, with another suggestion in the *Report* that where the case is of a nature to permit it, each party should be required, where practicable, to present as a unit all its evidence on each issue. The use of the word "require," however, would seem

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98. This was done by the plaintiff in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

99. This was done in *United States v. Oregon Medical Society*, 95 F. Supp. 103 (D. Ore. 1950).

100. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *United States v. Reading Co.*, 226 U.S. 324, 357 (1912); *United States v. Patten*, 226 U.S. 525, 544 (1913); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923); *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600 (1914); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *American Tobacco Co. v. United States*, 147 F.2d 93, 106-7 (6th Cir. 1944), *aff'd on other grounds*, 328 U.S. 781 (1946); *FTC v. Cement Institute*, 333 U.S. 683, 695 (1948); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). See note 102 *infra*.



to make this second suggestion only slightly less dangerous than the first one. This approach ignores the fact that chronology may have an importance in a case which might be lost or dissipated by strict rules of topical grouping. It invites counsel to move to dismiss an issue seriatim during the trial on the ground that all the evidence as to such issue is in and does not support the proponent's position. It also invites precarious judgments on the part of counsel as to when to leave an issue and whether to allocate an exhibit to a particular issue or issues.<sup>101</sup> It invites counsel to claim a document as relevant to many issues, thereby providing ground for much argument during the trial. It makes it difficult to *accommodate* the needs or convenience of witnesses. It has been the writer's experience that counsel generally try to do what the *Report* suggests, but that exceptions are often necessary. Counsel may well be encouraged to adopt an orderly system of proof, but a requirement of the sort suggested seems neither wise nor practicable.<sup>102</sup> The trial brief can make an analysis and grouping of exhibits far superior to that possible by a physical grouping of documents.

The *Report* would require that documents of similar content or effect be grouped and their similarity be announced by offering counsel. This second requirement is said to be for the purpose of permitting the court to deal effectively with cumulative evidence.<sup>103</sup> This verges on having the court substitute itself for counsel.<sup>104</sup> No attorney trying a case before a hostile court should be limited in making a record, with an

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101. In the *Investment Banking* case, *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), a pretrial order provided that where documents constituted an identifiable group in chronological sequence, the group was to be offered in evidence, and when a portion was relevant to a later subject matter, reference might then be made to them. This would make the pigeonholes flexible, but seems to make the logic of a grouping depend largely upon the order in which issues are to be dealt with at the trial, rather than on the relative importance of particular documents to particular issues. There was considerable departure from this requirement at the trial of the *Investment Banking* case, *supra*.

102. See *United States v. General Electric Co.*, 82 F. Supp. 753, 903-4 (D.N.J. 1949), where General Electric sought to separate the documents to which it objected into isolated parts. *Cf.*, *United States v. Aluminum Co. of America*, 1 F.R.D. 1, 6 (S.D.N.Y. 1939). The 1954 A.B.A. *REPORT*, although supporting the position of the *REPORT*, contains many qualifications in recognition of some of the problems which strict adherence to it would entail.

103. See text following note 158 *infra*.

104. In *United States v. E. I. du Pont de Nemours & Co.*, 10 F.R.D. 618 (D. Del. 1950), Judge Leahy, in denying defendant's motion to compel plaintiff to limit itself to a certain number of documents, remarked that care should be taken with innovations in this field that they not be used to deprive counsel of the right within reasonable limits to control the preparation and presentation of his case. As to the effect upon a defendant's case of not offering evidence, see *C-O-Two Equipment Co. v. United States*, 197 F.2d 489, 496 (9th Cir. 1952). As to a criticism of the "just enough evidence" approach, see *Niresk Industries, Inc. v. FTC*, 1960 Trade Cas. ¶ 76511 (7th Cir. 1960).

appeal in mind, because of a general approval of rigid exclusionary rules.<sup>105</sup>

105. It is believed that the opinion of the District Court in *United States v. Oregon Medical Society*, 95 F. Supp. 103 (D. Ore. 1950), suggests a considerable bias by the judge against the plaintiff for whom this writer was counsel. After the court had glanced at many of the plaintiff's documents before trial, the following colloquy occurred:

THE COURT: "That leaves, then, I guess, for discussion the motion to inspect or the issuance of subpoenas duces tecum which I took under consideration and have had under consideration for some time. For purposes of the record, the motion was filed on August 20, 1949. I am open to further persuasion or argument, Counsel, but it seems to me, after going through a thousand or more documents that I have already seen, that your theory of the case is covered very well by documentary matter."

COUNSEL: "Your Honor, may I point this out, that undoubtedly there will be a number of factual issues which will be a matter of interest. It is one thing to leave issues of that sort to a matter of inference where other information is not available; it is an entirely different matter, entirely another matter to allow that issue to be left as an issue to be determined by inference when there may be additional evidentiary material which would clear that matter up, and not leave it to an inference. It is our belief that the correspondence of these defendants will clarify a number of factual issues which otherwise would be left to inference. Your Honor, I would consider as an attorney of this Court and an officer of this Court that I have an obligation, not only to the Government but to the Court, to make available to the Court for use in determination of this case all the evidentiary material that may be available. I cannot conceive that I could so fill that obligation completely if I could not have the correspondence and other documents we have asked the defendants for, so that I could proffer them to the Court."

THE COURT: "I do not think I am denying you any documents. I have seen more than a thousand documents and I think they cover the whole ground of your case."

COUNSEL: "Your Honor, you have not seen the correspondence between these defendants and others?"

THE COURT: "Why do I have to see these thirteen years' correspondence of the State Medical Society?"

COUNSEL: "Because that correspondence, Your Honor, might clarify whether or not these defendants, in various aspects of the case, have done certain things or have not done certain things."

THE COURT: "You keep minimizing what I have said. From what I have seen, it seems to me you have documented your case."

COUNSEL: "Your Honor, you leave me somewhat uncertain as to the meaning of that observation. If Your Honor means that the documents we have presented make out a prima facie. . . ."

THE COURT: "If I mean you have won your case, certainly not; but if I have ever understood anything, I understand the theory of the case, and it seems to me that the theory of the case has been very adequately documented from what you have got before me already."

COUNSEL: "Your Honor, let me clear this one point, among others: Suppose the defendants, as they have said, take the position that prior to a certain period these defendants did certain things; after that period they did not do certain things. Suppose the correspondence between OSMS and OPS shows that they have actively been engaged in doing these various things."

Record, Vol. 1, pp. 3-5, *United States v. Oregon Medical Society*, *supra*.

The court refused, up to the time plaintiff rested, to allow subpoenas to be issued for or inspection had of the correspondence and certain other documents of two of the major defendants. He stated that he would permit counsel to call for specific documents as need arose during trial. At the time of resting, counsel for the plaintiff made a number of observations too lengthy to reproduce in full here, but the following excerpts

The *Handbook* recommends that a pretrial order should establish the sequence in which issues should be tried. Evidence is to be presented separately and seriatim as to each issue to the extent possible, but witnesses should not be required to make multiple appearances.<sup>106</sup> This is some improvement upon the recommendations in the *Report*, but it is sufficiently similar to raise most of the problems discussed to this point.

*"Cut-off" Dates.* The *Report* noted that in antitrust litigation the Government frequently asserted, as relevant and material, facts concerning the operations of defendants over long periods of time. It is stated that the incidence of the formation of a conspiracy may be proved no

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will serve to indicate the dangers of rigidity in matters of this sort:

Plaintiff believes that its exhibits, and the evidence produced at the trial, prove the allegations of its complaint, but since the Court, and not the plaintiff, must decide this case, counsel for the plaintiff believe they have an obligation to this Court and to the Government, to present to the Court relevant evidence which is not merely cumulative. Counsel believe that they have an obligation to the Court, and to the Government, to exercise their judgment as to what evidence should be offered, and that such judgment cannot be exercised without being permitted to examine the documents requested in the motion. Counsel for plaintiff state that, in view of the evidence already offered, counsel would not expect to introduce in evidence any considerable part of the correspondence and other records of defendants called for in the subpoena, but would want to introduce such correspondence and records as they believe should be called to the Court's attention.

Plaintiff believes that such motion should be granted before plaintiff rests its case, for the following reasons: (1) Plaintiff believes that the correspondence of these defendants will show that many acts in pursuance of the conspiracy charged have been performed during all of the years 1936 to 1949, and that in many instances an intimate connection with this conspiracy on the part of individual defendants will be shown by such correspondence.

We refer to two incidents which illustrate the points made: (1) According to exhibits and testimony, Drs. Shields and Beck notified the Multnomah County Medical Society of their intention to resign from the Oregon Medical Service Bureau (Weston). We believed they had been subjected to disciplinary proceedings, and on October 26, 1949, called for defendants to produce records of any disciplinary proceedings in which those doctors had been involved. Next day, those records were produced. On examination of those papers, it was found that not only had Drs. Shields and Beck been called in for disciplinary proceedings, but also a number of other doctors about whom we had no knowledge. . . . In our opinion, the disciplinary records of the defendants mentioned would reveal similar confirmatory proof as to other doctors, as would their correspondence. (2) We were informed, on October 26, 1949, that in Yamhill County the local medical society, in association with the Oregon State Medical Society and the Multnomah County Medical Society, had taken action to prevent a cooperative health organization in McMinnville from getting under way in 1947. We had to prepare to present that situation, and to present it to the Court, without having seen defendants' correspondence, which we believe exists, in respect to that situation. The records of defendants we have sought to subpoena might well reveal other situations similar to that in McMinnville.

Record, Vol. 1, pp. 918-19, *United States v. Oregon Medical Society*, *supra*.

It may be noted that the court found that if there had been a conspiracy, it had been abandoned about 1941. As to why a controversy as to the issuance of a subpoena arose, see 1958 *Seminar*, 23 F.R.D. 319, 347, 350-51 (1959).

106. *HANDBOOK*, p. 53.

matter when it occurred, but that overt acts or courses of action may well be irrelevant to any present remedial or punitive action, if remote in time. The *Report* asserts that the trial judge is fully justified in limiting proof of action alleged to have been performed pursuant to an established conspiracy to a period of time reasonably relevant to present possibilities of effective judgment. More than one counsel for a defendant and more than one judge are likely to disregard the qualifying language in the *Report*, "established conspiracy." It will be a rare judge who will tell counsel to omit proof of past events because he is satisfied that conspiracy has been established, especially if the question arises prior to trial.

The *Handbook* states:

The period of proof should be defined and limited by the trial judge at a conference prior to trial. . . . Protracted cases, and particularly antitrust cases, frequently become unduly protracted owing to the "ancient history" which is recited at length in the complaint and put in issue by denials contained in the answer. The value and importance of establishing cut-off dates have been emphasized by committees studying the problems presented by the big case. Careful consideration of the possibility of limiting the period of proof (particularly in civil antitrust cases brought by the Government) may reveal fertile ground for the development of ways and means of shortening otherwise long cases.<sup>107</sup>

In support of all this, the *Handbook* cites the *Report*,<sup>108</sup> the 1954 *A.B.A. Report*,<sup>109</sup> and the Attorney General's National Committee Report.<sup>110</sup> The *Handbook* also quotes several passages from an opinion by Judge Holtzoff.<sup>111</sup> In that opinion, he attributes inordinate length of trials in

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107. HANDBOOK, p. 54. The HANDBOOK suggests the following form of pretrial order: "The Court will not receive evidence as to Issue—relating to a period prior to. . . . This date shall not operate as a cut-off date with respect to evidence prior to that date which the offering party shows is relevant and should be received." App. 48. This may represent some slight retreat from the position taken in the body of the HANDBOOK.

108. Pp. 21-24.

109. Pp. 26-32.

110. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 364 (1955).

111. *United States v. Maryland & Virginia Milk Producers Ass'n*, 20 F.R.D. 441, 442 (D.D.C. 1957). As to two of the government's counts, a tentative ten year cut-off period was imposed. As to the third count, a longer period was permitted. This occurred in connection with discovery proceedings. The court, however, gave the Government leave to raise the matter again at pretrial and stated no reason had been presented to him to go back to the time requested by the plaintiff. An interesting sequel occurred. On February 10, 1958, Judge Holtzoff heard argument covering a "cut-off" date on the introduction of evidence. At the conclusion of the argument, he stated that he had become convinced that it would be "improvident" to fix a cut-off date at that time, noting that to do so might deprive a party of its rights, and left the question open until trial.

antitrust litigation largely to voluminous evidence reaching back many years that eventually has proved unnecessary. This, says the Judge, has created serious difficulties for the federal courts throughout the country. This writer, however, has yet to see the exponents of this point of view demonstrate its validity by specifying any antitrust case where a lengthy trial was caused by unnecessary ancient evidence.<sup>112</sup> A cut-off minded judge at the discovery stage of a proceeding might gravely impede the ascertainment of necessary relevant facts.

The Department of Justice agreed with the objectives of the cut-off recommendations in the *Report*.<sup>113</sup> It noted, however, that it would be a rare judge who, prior to completion of a trial, would notify counsel that he believed a conspiracy had been established. The Department also pointed out that it is often necessary to prove a conspiracy to show a series of acts which, by their very cumulation or persistency over a period of time, are probative of a conspiracy or attempted monopoly.<sup>114</sup> It might have been added that it is proper in antitrust cases to take into consideration the proclivities of a defendant in determining the judgment to be entered against him.<sup>115</sup> In considering divestiture or divorce-relief, the circumstances of the acquisition or the misuse of property are relevant. This may well necessitate delving into antiquity.<sup>116</sup> Monopoly and merger questions will often require examination into an informative past or, in the first instance, into a past to determine whether it is informative. Almost always when the Government seeks to

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112. The writer believes that he is familiar with the antitrust cases that had come before Judge Holtzoff at the time of his remarks in the *Maryland & Virginia Milk Producers* case, *supra* note 111. It is not believed that any of such cases, even though without cut-off dates, were of inordinate length; or that, if any evidence distant in time from the date of filing of the complaint was offered, it was appreciable in amount.

113. 1957 Seminar, 21 F.R.D. 395, 542 (1958).

114. See discussion of this matter in Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L.J. 1019 (1949). Compare McAllister's statement that proof of conspiracy is often proved by overt acts, that the distinction between conspiracy and overt acts is thus lost in the law and in the typical government tactics of proof, and that the only remedy is a flat cut-off. McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A.J. 289, 349 (1952). In *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1952), Judge Medina, during the trial, announced a cut-off date of 1935, but shortly reconsidered and later stated he was glad he had not used a 1935 cut-off date.

115. *E.g.*, *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 343, 347 (S.D.N.Y. 1950).

116. See *Schine Chain Theatres Inc. v. United States*, 334 U.S. 110 (1948). In a generally favorable resume of its brief experience since the REPORT, a former head of the Antitrust Division, in a letter of June 4, 1952 to Judge Prettyman, stated: "I am sure that their continued use will prove even more of a benefit to the bar and to litigants provided the courts are careful to comply with the evident intent of the Judicial Conference that the rights of all parties to adduce all of the evidence necessary to present the position of each such party should be protected."

delve into the past, it has some reason to believe the delving will be productive.

Overproving one's case is less likely and certainly less dangerous than having the court asking counsel, "Is that all you have?"<sup>117</sup> The number of overt acts counsel believes should be presented may be related to his belief of hostility on the part of the trial judge. Where such belief exists, counsel must expect to have the laboring oar on appeal, and an appellate court may well be more reluctant to overturn findings of fact where only a few overt acts tend to discredit the finding, than when there are a number.

Sophisticated modern executives, counselled by sophisticated members of the antitrust bar, may take care that current files appear innocuous.<sup>118</sup> Nevertheless the patina of an apparently colorless document may take on a different appearance when matched with an earlier document.<sup>119</sup> Periodic destruction of documents, a business practice of many corporations, or destruction for a more specific purpose, may create documentary time gaps.<sup>120</sup> In such cases, support for a bridge between such gaps may have to come from evidentiary pieces far apart.<sup>121</sup> The

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117. In *United States v. National Lead Co.*, 332 U.S. 319, 351-53 (1947), divestiture relief was denied largely because of absence of evidence in the record relating to the plants in question.

118. A story told in government circles—the accuracy of which the writer does not vouch for—is to the effect that an attorney was hired at least in part for such purpose by a large business firm. He was shocked and chagrined to find his client indicted and convicted for a conspiracy to fix prices without damaging evidentiary bits of paper. There is no reason to believe that he knew what the officers of his client were doing on the sly. The indictments returned in Philadelphia last year against a number of large corporations and some of their officers make fascinating reading of how to conspire without dirty corporate documents. The allegations have not been proved by evidence in a trial, but a number of the defendants attempted to plead *nolo contendere* and some, who were not permitted to so plead, have pleaded guilty.

119. Let us take a merger situation. A current document shows that the defendant company at the time of the merger had 20% of the market and the acquired company "X" had 10%. Then, it might be asked, why have discovery beyond the approximate time of the merger? There are many reasons, a few of which may be noted. What has happened in the industry over a period of years may be quite important. The defendant may have internal records which provide such information which may not be readily ascertainable elsewhere or may be a matter of serious controversy if derived from other sources. Again, a five year old document which says, "When and if 'X' attains 10% of the industry, we should acquire it to maintain our leading position," would be quite pertinent.

120. Antitrust lawyers have publicized their advice to clients concerning the latter's files. See, e.g., Van Cise, *Practical Planning*, N.Y. STATE BAR ASS'N SECT. ON ANTI-TRUST LAW, ANTITRUST SYMPOSIUM 103, 114 (1951). Destruction of documents, even after a complaint has been filed, has taken place in antitrust cases. Prompt discovery may prevent such destruction of relevant documents.

121. In one case with which the writer was associated, business destruction of documents was claimed by five defendants. Considerable light on current status and current activities was had from documents which had been secured by the Federal Trade Commission as of a period prior to such destruction.

emphasis of the *Report* and the *Handbook* is on discouraging the use of evidence more than a few years old. Yet in many antitrust cases, the courts have recognized the value of such evidence.<sup>122</sup> One of our greatest jurists has said, "A page of history is worth a volume of logic."<sup>123</sup> Nowhere is this more true than in many types of anti-trust cases.

It has not been unusual that defendants' attorneys have paid particular attention to this part of the *Report*. In many an antitrust case since the time of the *Report*, the cut-off issue has been a battleground contributing markedly to the protraction of pretrial proceedings. In 1952 and 1954, related events took place which were particularly seized upon by the cut-off proponents. In 1952, in the *Oregon Medical* case,<sup>124</sup> Justice Jackson, speaking for the Supreme Court, made an oblique allusion to

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122. "In antitrust cases, it is deemed essential to develop fully the background of the facts out of which the conspiracy is alleged to have arisen and in the midst of which it operated." *United States v. General Electric Co.*, 82 F. Supp. 753, 903 (D.N.J. 1949). The court, at p. 903, cites a number of Supreme Court decisions as strongly emphasizing this principle. See also *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); *A.L.B. Theater Corp. v. Loew's, Inc.*, 1959 Trade Cas. ¶ 69305 (N.D. Ill. 1959); *FTC v. Cement Institute*, 333 U.S. 683, 703-06 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 368 ff. (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 789-93, 804-05, 809 (1946); *United States v. Standard Oil Co. of New Jersey*, 173 Fed. 177, 184 (E.D. Mo. 1909); *United States v. Proctor & Gamble Co.*, 19 F.R.D. 122, 134 (D.N.J. 1956). In the case of *United States v. United Fruit Co.*, Civil No. 4560, E.D. La. 1957, the court, over defendant's objection, permitted interrogatory questions going back to 1899.

The problem may arise in connection with the use of subpoenas. Compare *In re Eastman Kodak Co.*, 7 F.R.D. 760 (W.D.N.Y. 1947) with *In re Grand Jury Investigation*, 33 F. Supp. 367 (M.D.N.C. 1940), or in respect to interrogatories, *United States v. E. I. du Pont de Nemours & Co.*, 1952 Trade Cas. ¶ 67717 (N.D. Ill. 1952).

It should be noted that generally the amount of evidence necessary to show early history is not substantial. The amended complaint in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) was filed in 1940. Trial took place in 1945. Certain aspects of plaintiff's documentary proof went back many years. Thus, to show that the ability of the unintegrated defendants to get first run playing time into the affiliated theatres had not bettered in recent years, the Government set up a table in its trial brief showing statistics for 1931, 1942 and 1944. Other such tables based particularly upon interrogatory answers and admissions of fact by defendants were used to show the existence and maintenance of monopoly power. A quotation from that brief attests to the value that early documentary evidence may have:

Thus the Paramount and RKO theatre interests in Michigan were consolidated with those of Butterfield by a twenty-five year agreement made in 1927, which is still in effect. (Ex. 387). The same parties in 1933 pooled all of the first run theatres in Grand Rapids by an agreement (Ex. 386) which also restricted future theatre acquisitions in the town by either party.

To show the evolution of provisions in the printed license forms used by defendants, plaintiff went back to 1917. *The plaintiff put in its main case in the Paramount suit in three days.*

In *United States v. Associated Press*, 326 U.S. 1 (1945), the fact that events of some 40 years were referred to did not militate against the case being decided on a motion for summary judgment. So, also, in the case of *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1959) (over 80 years).

123. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

124. *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952).

an "archeological approach" in terms likely to disturb an archeologist.<sup>125</sup> In the context of that case the remark seems particularly inappropriate.<sup>126</sup>

The 1954 *A.B.A. Report* supported an early cut-off. Relying heavily on the *Oregon Medical* case, the *Report* stated: "In that case the Government offered evidence covering conduct over an eighteen year period from 1930 to the date of the complaint in 1948. The trial court rejected evidence relating to evidence prior to 1941. Error was assigned by the Government on this point."<sup>127</sup> This was a highly erroneous statement.<sup>128</sup> This writer has had lengthy correspondence with officials of the American Bar Association and with the Chairman of the Committee responsible for its utterance in an unsuccessful effort to obtain an official

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125. The court in this connection cites the *REPORT*.

126. See note 128 *infra*.

127. 1954 *A.B.A. Report* at 31.

128. The evidence was admitted. The Government, of course, could not and did not assign rejection as error. The Supreme Court stated that the trial court rejected a grouping by the Government of its evidentiary facts into four periods—1930-1936, 1936, 1936-1941, and 1941 to trial. It stated that the trial court accepted the period since the organization of the Oregon Physicians' Service (1941) as significant and rejected the earlier years as "ancient history." Justice Jackson, speaking for the Supreme Court, said the trial court was correct in rejecting pre-1941 *events* as establishing the government's cause of action and stated the Court adopted this division of time periods of 1936-1941, and 1941 to trial. Since there was nothing in the trial court's opinion or findings or in the parties' briefs in the Supreme Court to indicate what the government's pre-1936 evidence consisted of, Justice Jackson's remarks lacked foundation in the record and thus seem particularly inappropriate.

The complaint, filed in 1948, charged a conspiracy starting about 1936. The plaintiff's pre-1936 evidence consisted of the following: One exhibit (Ex. 2083), a 1930 article in the defendant's official journal deploring private clinics and prepaid medical care organizations; one exhibit (Ex. 664) showing substantial growth of the latter between 1933 and 1936; and five exhibits dealing with restrictive practices of a prepaid medical care organization approved and participated in by defendants, and the latter's attitude toward that organization prior to 1936. Not only did this organization continue to exist long after 1936 under different names and subject to and imposing similar restrictions, but it also was a predecessor of Oregon Physicians' Service which took over certain of such restrictions. *Some of these documents were published and distributed by defendants after January 1, 1936.* Of the five exhibits, three were part of a 1935 report which in 1936 was made the basis of drastic action by the defendants, including the expulsion of doctors over a number of years after 1936. One was a 1940 transcript of disciplinary proceedings in which an officer of one of the defendants made the following remark concerning private prepaid medical care organizations: "They have never had the approval of organized medicine, and it was only with the depression, about ten years ago that any effort was made to curb them." (Ex. 1057, p. 7).

In the context of this article, it is relevant to ask how much time of the court was taken up with this pre-1936 evidence. Reference to this evidence did not exceed fifteen minutes at the trial. In a trial brief of 516 pages, 11 pages were devoted to this material, consisting in part of excerpts from a 1936 publication of the defendants. In contrast, the trial court admitted over plaintiff's objections correspondence between doctors and private prepaid medical care organizations relating to their experiences with such organizations not only prior to 1936, but prior to 1930. It was the *plaintiff* which objected to the introduction of evidence on the ground of remoteness.



retraction.<sup>129</sup> The quoted statement has been used in a number of instances by defendants' attorneys in government antitrust cases seeking to curtail discovery proceedings or the use of evidence.<sup>130</sup> It has also been referred to as gospel by speakers and writers.

We may note that the Supreme Court in the *Oregon Medical* case said: "Of course, present events have roots in the past, and it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings."<sup>131</sup> It is encouraging to note that although sporadic support has been shown for rigid cut-offs,<sup>132</sup> most courts have refused to be rushed in yielding to requests therefor, and have either acknowledged the worth of such evidence or the right of counsel to demonstrate its worth.<sup>133</sup>

With all due deference to the authors of the *Report*, it is believed that such evidence is generally relevant and normally not very time consuming; complaints by judges of such evidence have been as rare as the absence of complaints by counsel for defendants who fear the less hidden past more than the more sophisticated present.<sup>134</sup> The past is often a clue to the nature or motivation of present events, as well as being explanatory of a present status. The fact that over a period of thirty years no new competitors came into an industry may well be more probative of monopoly than the fact that none came in during the past three years.<sup>135</sup>

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129. The Vice-Chairman of the Section of Antitrust Law of the American Bar Association agreed with this writer that the statement was in error. The Chairman of the Committee, however, took the position in a letter of June 26, 1957 that: "We merely paraphrased and quoted the Supreme Court's opinion which stated that the trial court had 'rejected' pre-1941 evidence in arriving at its decision." The 1958 A.B.A. SECT. ANTITRUST L. 201 does not refer to the *Oregon State Medical Society* case in support of a cut-off date.

130. *E.g.*, *United States v. United Fruit Co.*, Civil No. 4560, E.D. La. March 1957. *United States v. Driver Harris Co.*, Civil No. 942-56, D.N.J. 1956.

131. 343 U.S. 326, 332 (1952).

132. 1957 *Seminar*, 21 F.R.D. 395, 514-15; 1958 *Seminar*, 23 F.R.D. 319, 408; *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 1958 Trade Cas. ¶ 74814 (S.D.N.Y. 1958); *United States v. The Borden Co.*, 1953 Trade Cas. ¶ 68323 (N.D. Ill. 1953).

133. *Metzger v. American Window Glass Co.*, 1958 Trade Cas. ¶ 74595 (E.D. Pa. 1958); *Sandee Mfg. Co. v. Rhom & Haas Co.*, 1959 Trade Cas. ¶ 75194 (N.D. Ill. 1959); *Leonia Amusement Corp. v. Loew's, Inc.*, 16 F.R.D. 583 (S.D.N.Y. 1954). *Cf.*, *Philco Corp. v. FCC*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70063 (D.C. Cir. June 29, 1961); *Cf.*, 1957 *Seminar*, 21 F.R.D. 395, 521 (1958); see note 122 *supra*.

134. There are many antitrust cases in which such evidence has been received without any apparent issue to it being raised.

135. Thus, in *Hartford-Empire v. United States*, 323 U.S. 386 (1945), plaintiff showed that over a long period of time Hartford either refused to give applicants licenses or gave them very restricted licenses. Defendants as to some could make a plausible explanation, but found it difficult to do so in the face of both the length of time during which Hartford so acted and the number of times such action occurred. This case illustrates another danger of relying entirely upon the present. By the time of the suit, a number of glass container companies had become satisfied with their own restricted status because others, in turn, were restricted from competing with them; and

A pre-war act similar to a post-war one may have more significance than what occurred during a more recent war period. The average judge is quite capable of protecting a defendant from prejudice arising from an exploration into a disreputable past which has no relevance to the issues in a case.<sup>136</sup>

*Evidence of Post Complaint Changes.* The trial of an antitrust case generally should not be permitted to be prolonged by allowing the defendants to adduce evidence of changes in practices arising after the filing of the complaint.<sup>137</sup> They should, however, have such opportunity after being found to have violated the antitrust laws. A device sometimes used is to have a pretrial order provide for the reservation of evidence pertaining to the judgment to be entered until (and if) the defendants are found to have violated the law. This may be feasible in some cases, but in others it will not. In general, matters of status and change of practices post complaint may be more readily weighed after trial of issues of violation than other matters upon which the terms of a judgment should depend.<sup>138</sup>

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there were so few glass making machinery manufacturers extant that it took extensive history to show that what looked normal was abnormal, and to show how the industry had reached such status and what had happened to actual and potential competitors.

136. Cf., *Alamo Theatre Co. v. Loew's Inc.*, 143 F. Supp. 419 (N.D. Ill. 1956).

137. *United States v. E. I. du Pont de Nemours & Co.*, 11 F.R.D. 308 (D. Del. 1951). It has been said, however, that when the defendants in the *du Pont* suit opened their case, the court admitted post complaint evidence of expanding competition in the industry and cessation of alleged restrictive practices. Gesell, *Review of Procedure in Antitrust and Other Protracted Cases*, 65 HARV. L. REV. 1085 (1952). See also *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 162 (D. Del. 1953). In a recent case in which the large meat packers sought to have prohibitions in a 1920 consent decree lifted, they were allowed, over the government's objections, to adduce proof of matters, occurrences and conditions existing beyond the time of their filing their petition to amend. *United States v. Swift & Co.*, Civil No. 58C613, N.D. Ill., Transcript, 1960. Evidence disprobative of the charges should be admitted no matter when it occurs. Where there is an issue of mootness, such evidence may also be relevant.

138. *United States v. L. D. Calk Co.*, 114 F. Supp. 939 (D. Del. 1953). A good deal of time and effort may be lost if there is a long lull between the time of termination of the trial, the decision of the court, and another hearing as to the judgment to be entered. Both court and counsel may have to renew acquaintance with a case that has grown cold. Findings of fact upon which a judgment should be based present a problem in such a situation. Should the court make, or counsel propose, findings before a hearing on the judgment but after a violation has been found? Should there be two sets of findings?

The problem of the plaintiff and the defendant may well not be the same. The defendant may desire to adduce the current situation as of as late a date as possible. The plaintiff, in order to show how property was acquired or used, or to show the proclivities of the defendants, may have to go back a considerable period before that time. The availability of witnesses may be an acute problem. In some areas trial of an antitrust case may not be reached until three or four years after the filing of complaint, and a decision may not be forthcoming until some time later. An example of a case where the nature of the evidence made entry of a complete judgment possible is *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948), which is to be contrasted with *United States v.*

*Bulk Documents.* The *Report* and the *Handbook* devote a good deal of space to the subject of bulk documentary evidence. It is not uncommon in antitrust cases for a large number of documents to be offered at the opening of the trial. This frequently is done at the specific request of the judge.<sup>139</sup> With respect to such bulk direct evidence, the *Report* and the *Handbook* recommend that in pretrial conferences the judge announce that he will not admit to the record unassorted, unexpurgated, or unidentified documentary material. The *Report* also recommends that when only portions of documents are admissible, the offering party prepare and supply copies of those portions with accompanying identification of their source. The whole of the document should be available to the judge and counsel for purposes of identification and cross examination, but physically the record should consist of the copies of the relevant portions only.<sup>140</sup> The *Report* contains the somewhat confusing recommendations that evidence which is merely "possibly helpful," or which merely implies an "atmosphere," or "background," may be rigidly excluded. Then, after admitting such evidence may be desirable in the ordinary case, the *Report* states that in the big case, "that which is unnecessary should be strictly excluded from the record."<sup>141</sup> The *Handbook* does not go as far in this respect as the *Report*, and adopts a more practical approach which, nevertheless, still seems too rigid.<sup>142</sup>

Before commenting on the above recommendations, it should be pointed out that in a big antitrust case, the plaintiff almost invariably offers the major part of the documentary evidence. The first of the above two recommendations, if applied as a general rule to the trial of

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Paramount Pictures, Inc., 334 U.S. 131 (1948) where the nature of the evidence made entry of such judgment impossible. The last was streamlined, the first was not.

139. In the *Investment Banking* case, exhibits were given an intricate system of marking numbers and letters, according to whether they were received against all defendants, against some, whether received subject to connection, motion to strike, etc. A pretrial order provided that a series of underwriting agreements be offered as a single exhibit and that certain documents relating to public sealed bidding be fastened together in one volume and offered in evidence as such, but that separate exhibit numbers be given. The value of such an intricate system of numbering is open to question.

140. *REPORT*, p. 21 ff.

141. *REPORT*, p. 25. The Antitrust Division of the Department of Justice in a letter of February 15, 1952 to Judge Prettyman, assumes that "unnecessary" qualifies the recommendation of rigid exclusion. The letter notes that, "background evidence in many antitrust cases is often necessary to a full understanding of the industry involved, see e.g., *United States v. American Tobacco Co.*, 221 U.S. 106." To that case might be added *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943). See note 122 *supra*.

142. "A party offering any documents shall indicate on the document the portion relied upon, if less than all [and only that part shall be read]. In the case of lengthy documents or books, copies of the parts relied upon shall be prepared and used as exhibits. The whole shall be available for examination, but normally will not be admitted." 25 F.R.D. 461 (1960).

an antitrust case, might at times impose an intolerable and impractical burden with respect to expense and personnel upon a plaintiff. Thus, in the *Oregon Medical* case, minutes of medical societies, editorial comments, and articles in publications of the defendants were put into evidence by the plaintiff. In many instances, a page of the minutes would contain two or three relevant paragraphs interspersed among ten or more irrelevant paragraphs. In some instances where the writer of the minutes showed his independence of paragraphing, there would be relevant sentence and irrelevant sentence nudging one another on a single line, with or without punctuation. To have had to make copies of the relevant portions would have been an extremely difficult, time consuming, and expensive enterprise.<sup>143</sup> The use of excerpts may also engender argument which may nullify the time saving element.<sup>144</sup>

The problem, where it is a problem, may generally be met less drastically by crossing out irrelevant parts on the document offered,<sup>145</sup> by distinctly marking the portions relied upon, or by doing as was done in the *Oregon Medical* case, where counsel for the plaintiff gave court and opposing counsel a list of documents, designating the portions offered—where such designation was practicable. In most instances the relevant material on a particular page was readily discernible. Entire irrelevant pages were not offered. In many instances, a statement of the purpose for which a document was offered served to earmark the relevant portions of the document. *Where adequate trial briefs are filed with the court, the judge will rarely be troubled over such matters unless he attempts to try most of the case in pretrial.* If a party is able and willing to furnish to the court and the other side excerpts and/or digests of the

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143. As to how the problem was met in that case, see note 157 *infra*. Generally, the relevant material is so clearly distinguishable from irrelevant matter in a document that no real problem of confusion or time consumption exists. This is all the more true when, as generally happens, counsel has made reference to the document with respect to a particular point he is trying to make.

144. In the *du Pont* case, defendants filed comments respecting plaintiff's proposed findings. It was asserted that the Government did not offer many documents which explained or qualified those excerpts used by the Government and that a great many of the excerpts offered by the Government were designed to create an inference contrary to the substance of the document as a whole or to omitted statements. See also *Seminar*, 28 F.R.D. 37, 153 (1961).

145. This is also done for Supreme Court printing purposes when the original record is sent up to that Court from the trial court. In some cases the actual record to be used by a court may be shortened, with the cooperation of counsel, by putting a series of descriptive documents in evidence and then before the court reporter, but not necessarily before the court itself, briefly summarizing the contents of the documents—the summarization to be part of the transcript. Unless something unforeseen arises the parties and the court thereafter may use a reference to a few pages of the transcript in lieu of many pages of exhibits. This was done in part in the *Schine* case with respect to a series of leases. Counsel should, however, be required to have such matter introduced before the court if either counsel so desires.

documents he intends to offer, he should be encouraged to do so by the court's willingness to receive such aids. However, compulsion to use such system is an entirely different matter.

*Burden on Party Offering Documents.* The *Report* recommends that the party offering or proposing to offer quantities of documents should be required to show that they are competent, relevant, and material. This recommendation has met with some support.<sup>146</sup> The *Reports* admits that such action would be a reversal of traditional procedure. Since documents in an antitrust case are primarily those offered by plaintiffs, this recommendation effectually creates a presumption of inadmissibility with respect to documents offered by a plaintiff in antitrust cases. It is a proposal which appears to run counter to Rule 43 (b) of the Federal Rules of Civil Procedure as well as to the enlightened tendency to liberalize rules of evidence generally and especially in antitrust cases.<sup>147</sup> In practice, it may even defeat its only justification since in the trial of a big case, as to many documents, ordinarily no objections are raised and no arguments had.<sup>148</sup> The procedure suggested by the *Report* will invite argument as to admissibility of documents which under traditional procedure would never arise. This is particularly true if this recommendation extends to the individual documents which are part of a group.<sup>149</sup> A document obviously admissible would always require an explanatory appendage. In antitrust cases it is rare for a document to be attacked for incompetency, but under the *Report* recommendation, competency would have to be explored. The Antitrust Division of the Department of Justice supported this recommendation, but was of the view that the party offering the documents could make his showing in general terms

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146. See 1957 *Seminar*, 21 F.R.D. 395, 465 (1958).

147. See Note, 5 VAND. L. REV. 655 (1952); Buttle, *Trial Problems in Antitrust Litigation*, 19 BROOKLYN L. REV. 169, 189, ff. (1953); *United States v. General Electric Co.*, 82 F. Supp. 753, 903 (D.N.J. 1949). See note 30 *supra*.

148. A counsel objecting to an offer of a document can generally do so by the use of the word "irrelevant," etc., but it is doubtful that the proponent could satisfy this proposal by offering a document and saying it was "relevant."

In *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), Pretrial Order No. 1 provided that prior to the trial, sets of documents were to be prepared and marked with exhibit numbers. Documents relied upon by the parties were to be offered at the opening of the trial subject to appropriate objections. At the opening, counsel were to be given the opportunity to discuss the contents, significance, and interpretation of documents. Following discussion, objections might be argued. It is said that 15 days were spent in discussing the Government's documents and 6 days in discussing the defendants' documents before trial. See McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 37 (1950). In *United States v. United Shoe Machinery Corp.*, 93 F. Supp. 190 (D. Mass. 1950) many days were also spent discussing documents.

149. Competency, for example, is much more likely to be a problem with respect to particular documents than with respect to large groups of documents.

unless the court or opposing counsel required more details.<sup>150</sup>

The *Handbook* is less far-reaching in this area than is the *Report*. It recommends that where documents are offered in a group the offering party should demonstrate that the "group of documents is relevant and material."<sup>151</sup> It omits reference to "competency." The basic approach, however, is the same. The writer does not believe that it is proper to assume that the plaintiff's attorney is offering a group of documents which are irrelevant or immaterial. If defendant's counsel believes they fall into those categories, he should be required to raise that issue.<sup>152</sup> A recommendation of this sort would seem to entail more work, rather than less, on the part of the judge.<sup>153</sup> It might lengthen rather than shorten protracted cases.

Relevance of a mass of documents in an antitrust case might well be left to be shown by what counsel do with the documents in a brief: Do they or do they not spell out a relevant story? It might very well be that in a non-jury antitrust case where there are a great many documents, the court might avoid all rulings on evidence at least as to relevance until its final decision, at which time it might merely indicate what documents it did not regard as admissible.<sup>154</sup> A party should not be prejudiced, however, by a delayed ruling of inadmissibility when the evidence is important and counsel has not been given an opportunity to state whether he is able to substitute other admissible evidence. Where there has been objection to an offer of such evidence, it would behoove counsel to ask for an early ruling.<sup>155</sup>

In the *Oregon Medical* case, the plaintiff's documents on direct were admitted "subject to objection."<sup>156</sup> In an endeavor to obtain a definitive

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150. 1957 *Seminar*, 21 F.R.D. 395, 542-43 (1958).

151. *HANDBOOK*, p. 58.

152. Pursuant to other recommendations of the *REPORT* and the *HANDBOOK*, normally he would have become familiar with such documents before the trial.

153. The 1954 A.B.A. *REPORT*, while endorsing the Conference *REPORT* on this matter, refers to its failure and ultimate inutility in the Investment Banking case, *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), and cautions that counsel should not be required to justify each exhibit. The 1958 A.B.A. *SECT. ANTITRUST L. 202*, would require the offering party to show that the group of documents is relevant and material. It is silent on the question of competency.

154. *Cf.*, *United States v. Schine Chain Theatres, Inc.*, 63 F. Supp. 229, 242 (W.D. N.Y. 1945).

155. In *United States v. Shubert*, 14 F.R.D. 471 (S.D.N.Y. 1953) a stipulation embodied in an order of the court provided "if the court does not rule as to the admissibility of any documents prior to the completion of plaintiff's main case, either counsel may ask the court for a ruling and if any documents are ruled inadmissible, the court shall grant counsel a reasonable opportunity to offer substitute proof if counsel specifically state they wish to make such offer." *Cf.*, *SEC v. Glass Marine Indus.*, 194 F. Supp. 879 (D. Del. 1961).

156. Strangely enough, plaintiff's documents on rebuttal were admitted without such qualification, except for one or two which were expressly excluded.

ruling as to a certain class of documents, counsel for the plaintiff filed a list of all documents stating whether a document was filed for all purposes or specific purposes. Counsel for the defendants did the same with his documents and both sides filed written objections.<sup>157</sup> Despite all this, no express ruling was obtained from the court. While it is believed all the documents were regarded as admitted, the court's opinion gave very little inkling of whether it had excluded any evidence or whether it had used any particular evidence in reaching its decision.<sup>158</sup>

*Cumulative Evidence.* The *Report* recommends that where there are large amounts of documentary evidence, the judge should limit admission to that which is actually necessary to his consideration of the case. It is said that merely cumulative evidence should be excluded and its availability can be summarily noted on the record. Such approach, without cautionary language, leaves much to be desired. Instead of counsel deciding what is "necessary" for his case, the court is likely to assume that function, even when it is going to decide the case for the

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157. The preface to plaintiff's list stated: "Unless otherwise specified, all of the exhibit is being offered. In the case of a few voluminous documents, and a few documents with many paragraphs of diverse matters, which contain interspersed clearly relevant and clearly irrelevant matter, the whole document has been offered because of the complexity in setting down on paper what parts are offered and what are not.

"Statement as to the purpose for which the exhibit is offered. When letters are offered for all purposes, they are also offered: (1) to show the state of mind of the writer or person on behalf of whom the letter was written; (2) the fact that it was written by the person whose signature or initials appear or on whose behalf it was written; (3) that it was sent to the addressee, and the addressee received it; (4) and when taken from the files of a particular hospital association that it was brought to the attention of that hospital association.

"Unless the offer is qualified, sample contracts, circulars, certificates and tickets offered are offered to show type of business engaged in, type of service and coverage of service, as well as for the information contained in such exhibit. As to circulars, they will be offered also for the fact that, as circulars, the matters contained therein were publicized in Oregon. Whenever a Northwest Medicine, Medical Reporter, or Bulletin of the Multnomah County Medical Society is referred to, the name and date of publication is included in the offer. It is also offered for the fact of the contents being circularized among Oregon doctors, and that the latter have knowledge of the statements made, as well as for other specified purposes.

"The term 'for information therein' is not intended as a limitation of purpose, but for the most part indicates that its contents are thought to have a less obvious bearing on the conspiracy by themselves than those offered for all purposes. Plaintiff reserves the right, after the defendants have filed objections to any exhibit, to enlarge on the purposes for which it is offered."

The plaintiff's written objections to defendants' exhibits were prefaced by the statement: "In addition to the reasons for objection to defendants' exhibits hereinafter listed, plaintiff also objects to any correspondence prior to January 1936, on the ground of remoteness. Absence of objection to any of defendants' exhibits is not to be deemed acquiescence in their admissibility for the purpose of defendants' offer, but that they may be admissible for other purposes."

A pretrial order in the *du Pont* case provided for the filing of written objections to documents. Cf., *SEC v. Glass Marine Indus.*, 194 F. Supp. 879 (D. Del. 1961).

158. 95 F. Supp. 103 (D. Ore. 1950).

other side. It should be remembered that a judge who is satisfied with two documents need not read ten others just because they are in the record. Summary notation on the record of availability of evidence is likely to raise perplexing problems in getting up a record for the appellate court. What was said earlier with respect to the problem of cumulative evidence is also applicable here.<sup>159</sup> The situation may well differ, however, where the proponent agrees unreservedly with the court that X documents make the use of Y documents unnecessary. The *Report's* recommendation does have the merit of preserving some sort of record of "cumulative evidence." The court might also ask counsel to try to agree that the record note the availability of other prospective witnesses who would testify along the same lines as previous witnesses.<sup>160</sup>

*Underlying Data.* The recommendations of the *Report* and of the *Handbook* with respect to identifying, rather than offering, underlying data are often adopted in antitrust cases.<sup>161</sup> Here again, however, if the proponent desires to offer underlying data in evidence, it may be accepted without the court's being required to look at it. Of course, if the summary is disputed and the parties disagree as to what the underlying data shows, admission and consideration of such data may be necessary.

*Depositions.* The *Report* recommends that summaries of voluminous depositions be used in lieu of the deposition. This may be difficult to do for already overburdened legal staffs. It may also lead to endless arguments, since one party will rarely be satisfied with the other's summary. In the *du Pont* case in Delaware, when the court asked for summaries, the wrangle that ensued was finally solved by the use of the

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159. See text following note 102 *supra*.

160. In *Emich Motors v. General Motors*, 340 U.S. 558 (1951), after seven witnesses had testified in rebuttal to another witness that they had not been coerced, the trial court refused to allow additional testimony of this sort, but did allow an offer of proof outside of the jury. 49 S. Ct. Rec. & Briefs, 6440-45 (1950).

161. The *HANDBOOK* recommends that where the other side has seen the underlying data, only so much data as is necessary to present objections should be made part of the record. 25 F.R.D. 424 (1960).

In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), it was stipulated by the parties that daily tobacco buying reports might be introduced by the Government by production of the boxes or containers, each of them to be identified as an exhibit and to be treated as introduced in evidence as a whole and except where particular documents were to be taken from the mass or read or exhibited to the jury, they were not to be copied into the record, it being understood that with that exception production was to enable statistical studies to be made.

In *United States v. Imperial Chemical Ind., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), paragraph 15 of Pretrial Order No. 1 stated that no objection to a schedule or other compilation would be made on grounds that the source material of such schedule or other compilation was not available in court, provided that the identity and location of the source material was indicated on the schedule or compilation, and a copy furnished the other party not later than 30 days in advance of their being offered in evidence.



depositions. Most depositions are fairly short.<sup>162</sup> Nevertheless, the idea of using summaries is a step in the right direction. It is believed that it is better to offer this possibility to counsel as a permissible tool rather than a suggested one. Designation of parts of depositions a party desires the court to read and counter-designations by the other party offer, however, a better method to save time and shorten the record.<sup>163</sup> The *Handbook* favors designation or summaries if there is agreement as to the latter.<sup>164</sup>

*Discussion of Relief.* The *Handbook* recommends that discussion be had at pretrial as to what relief would be appropriate were the allegations in the complaint proved, or as to what relief the Government and the defendants would accept in a consent decree.<sup>165</sup> The 1954 *A.B.A. Report* recommended that the Government be required to spell out in detail at the outset the relief desired in civil antitrust suits brought by it.<sup>166</sup> These can be very dangerous recommendations. Use of such recommendations is likely to lead to pretrials being used for compulsory settlement purposes. Many a judge has a hesitancy or even mental block as to relief in an antitrust case which he does not have with respect to the question of violation. Often it takes long familiarity with a case and full development of the facts before a court is ready to grant adequate relief. An early discussion of relief is likely to elicit from a judge the remark, "I'll never give you such relief,"<sup>167</sup> and creates an atmosphere not consonant with either the advancement of an unhampered trial or the promotion of a proper judgment.

Settlement negotiations, especially in a big antitrust case, are not a matter of conference of an hour or two. They are often long and drawn out, extending over weeks or months, with numerous meetings. At such conferences, rhetoric may not be altogether absent, but it is at a minimum as there is no judge to seek to influence. Informality, taking

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162. See *Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131, 134, 136 (1952).

163. See 1954 A.B.A. REPT. 50-51; 13 A.B.A. SECT. ANTITRUST L. 204-05 (1958).

164. HANDBOOK, pp. 63-64. On this question of depositions, see also 1957 *Seminar*, 21 F.R.D. 395, 513 (1958); 1958 *Seminar*, 23 F.R.D. 319, 462-63 (1959).

165. HANDBOOK, pp. 44-45; App. 42. See also 1958 *Seminar*, 23 F.R.D. 319, 408 (1959).

166. See also 13 A.B.A. SECT. ANTITRUST L. 197-98 (1954).

167. This happened in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) in the trial court. The case went to the Supreme Court twice on the question of relief. More recently, a discussion of relief at pretrial in an antitrust case led to the court's ire over counsel's refusal to back down from a significant part of the relief sought after the court indicated it would not give such relief. The writer recognizes that a judge, at the outset, might say: "I don't see why such relief might not be proper." While this might induce an early settlement, it might invite lengthy argument by defendants and a request to prove the contrary.

time to check a claim, and many other factors are involved in such negotiations. Pretrial conferences are neither of the same mold nor an adequate substitute for such negotiations. Nor should counsel be put in a position of revealing his evidence at a pretrial on particular points when faced with the possibility that a trial may be forthcoming if the conference is not successful.

The procedure suggested would also promote lengthy complaints in which elaborate allegations of intermediate as well as ultimate facts would greatly inflate antitrust complaints. Complaints do and should vary in the specificity of the relief prayed for. This may be because discovery is more necessary in one case than another, because of differences in the complexity of the industry involved or because of the desirability of having the defendants initially submit a plan of divorcement or divestiture.

The writer does not believe that relief should never be discussed at a pretrial. If the parties have had settlement negotiations and have agreed on all except one point, then if both sides are willing to have the judge decide this point, a long trial may be unnecessary. But it may be noted that even in this instance, argument before the judge may not be enough; it may be necessary to adduce evidence with respect to such point. It would seem, therefore, that with rare exception, there should not be a discussion of or ruling upon relief at pretrial before the facts have been adduced in full.<sup>168</sup>

*Timetable.* The establishment of a timetable, rigid enough to put some pressure on counsel to act within a reasonable period of time, but flexible enough not to prejudice non-dilatory preparation of one's own case or answers to demands by one's opponent, is often desirable.<sup>169</sup> In one case with which this writer was associated, refusal of the judge to impose time limits on defendant's counsel resulted in at least a year's unnecessary delay as well as a violation of the time limits imposed by the Federal Rules of Civil Procedure.

*Samples, Surveys and Polls.* It is often found in antitrust cases, particularly those involving merger, that the critical issue of published

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168. In *United States v. Brunswick-Balke-Collender Co.*, Civil No. 9-C163, E.D. Wis. 1959, after settlement negotiations broke off, the defendants in June 1960 filed a motion to enter a judgment proposed by them. Upon the request of the court, the Government filed a counter judgment and a brief in opposition to defendant's motion. At the time of this writing the matter is still pending. In *United States v. Allied Chemical Corp.*, Civil No. 59-784, S.D. Mass, 1960, the court on November 28, 1960, orally announced its intention to deny a similar motion. A consent judgment was then negotiated.

169. See *Streamlining the Big Case*, 13 A.B.A. SECT. ANTITRUST L. 183, 195; HANDBOOK, p. 39.

market statistics are either not available or do not meet orthodox rules of evidence. Polls, sample surveys, or broad surveys at the instance of one or more of the parties are then undertaken. After tremendous expenditures of time and money, they may be thrown out by the court upon objection of a party, admitted but given little weight, or be the subject of extensive testimony and argument. Where such survey or poll seems necessary or desirable, the court should endeavor to have counsel for the parties agree on how such survey should be made; and if agreement is not to be had, the court should advise counsel at pretrial of the guidelines upon which, if followed, the survey will be admitted.<sup>170</sup> If problems arise in the making of such a survey, the court should be available to pass or advise upon proposed solutions. In general, it is believed that surveys and polls should be readily received in antitrust cases, with attention on objections confined largely to weight, rather than to competency.<sup>171</sup> It should be noted that the *Handbook* adopts a more cautious approach to sample surveys and polls<sup>172</sup> than is warranted in a treatise designed to cut down on the length of protracted cases.

*Discussion of Documents in Briefs.* In lieu of lengthy discussions as to masses of documents, it would seem that in many such cases much time could be saved by having the parties submit briefs to the court, and then having the court hold a one-day hearing on points that remained bothersome. Moreover, in a case where there is going to be a substantial number of witnesses, it is often helpful for counsel to read from exhibits once or twice a day for short periods of time.<sup>173</sup> This gives counsel a chance to emphasize his more important documents, to tie up or support the testimony of a witness while his testimony is still fresh in the mind of the court, and helps break up the monotony which often occurs in a long trial. Of course, in many instances, discussion of a document is

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170. Cf., *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 305 (D. Mass. 1953).

171. *United States v. Columbia Pictures Corp.*, 25 F.R.D. 497 (S.D.N.Y. 1960). See *United States v. National Homes Corp.*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70095 (N.D. Ind. Aug. 4, 1961). In the *Paramount* case, 334 U.S. 131 (1948), the Government, to show in what theatres motion pictures customarily played first run, selected certain pictures during certain years for that purpose. See *United States v. Swift & Co.*, Civil No. 58C613, N.D. Ill., Oct. 2, 1959. Surveys conducted by a defendant or by a third party for a defendant, found in defendant's files, have been used by plaintiffs in antitrust cases. Government counsel are as prone to make technical objections to surveys as are counsel for defendants. In *United States v. Brown Shoe Co.*, Civil No. 10527, E.D. Mo. the court, in face of objections by both sides, did admit a number of surveys, but rejected other tables based upon Bureau of Labor statistics and Bureau of Census data where the original data was not available to counsel.

172. *HANDBOOK*, pp. 72 ff. See also 13 A.B.A. SECT. ANTITRUST L. 219 (1958); 1958 *Seminar*, 23 F.R.D. 319, 477 (1959).

173. Cf., Yankwich, *Observations on Antitrust Procedure*, 10 F.R.D. 165, 169 (1951).

immeasurably aided by having on the stand a witness who is familiar with it.

*Designation of Spokesmen.* Where there are a considerable number of counsel for defendants, it may save considerable time and confusion for one of them to be designated to deal with the plaintiff respecting questions arising in connection with documents.

*Motions.* In the *Besser Mfg.* case,<sup>174</sup> a pretrial order required that motions on pleadings be made forthwith. While the making of motions directed to the pleadings at an early date should be encouraged, they should not be cut off by any time limit if their disposition would expedite the trial. Thus, the striking of parts of a complaint or an affirmative defense should not be defeated by the time limitations of Rule 12 of the Federal Rules of Civil Procedure. This may be accomplished by a liberal exercise of the court's initiative when a belated motion brings the matter to its attention,<sup>175</sup> or by accomplishing the same result as a motion to strike by a pretrial order under Rule 16 of the Federal Rules. Pretrial conferences sometimes serve as a means for hearing motions which otherwise might not be heard, or would be heard only on an infrequently scheduled motion calendar.

*Canned Testimony.* A trial may be expedited by the willingness of the parties to permit written statements of witnesses with the preface: "If called to testify the undersigned would testify --." This is more often done with respect to defendants' witnesses than with respect to those of the plaintiff, but in a few instances within the writer's knowledge, the Government was the beneficiary of such an agreement.<sup>176</sup> Judges should be willing to require, when one side so desires, when appreciable time and expense would be saved, and when no substantial considerations otherwise negate, that a written statement be admitted; subject to the right of the opposing party to have the writer available for cross examination, with the judge to determine on whom the expense should fall. There are often certain subsidiary issues for which this

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174. *Besser Mfg. Co. v. United States*, 343 U.S. 444 (1952).

175. See *United States v. Shubert*, 14 F.R.D. 471 (S.D.N.Y. 1953).

176. *E.g.*, affidavits in *Besser Mfg. Co. v. United States*, 343 U.S. 444 (1952), and numerous statements in affidavit form in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). In *United States v. Oregon Medical Society*, 343 U.S. 326 (1952), plaintiff offered without objection letters from a Regional Director of Wages and Hours located in California, stating the position that organization had taken with respect to employees of certain companies, and also a letter from an insurance official respecting use of certain insurance forms in effecting malpractice insurance. In the *Paramount* case, *supra*, statements of certain persons as to their position with various companies were introduced in evidence by the Government. See 1958 *Seminar*, 23 F.R.D. 319, 615 (1959).

procedure in whole or in part is particularly apt.<sup>177</sup>

*List of Documents.* Where the use of a number of similar documents is necessary to prove a point and both sides have access to the documents, it should be possible to file a list of such documents by stipulation or upon affidavit of counsel that the list is what it purports to be, rather than having to offer the actual documents. An example might be where it is sought to show the existence of a general practice, denied by defendants, through the use of many similar contracts.<sup>178</sup>

*Excluding Evidence of Immaterial Defense.* The Antitrust Division of the Department of Justice has pointed out that many antitrust cases could be shortened if judges were strict in excluding evidence in support of immaterial defenses such as "good motives."<sup>179</sup> On this point, however, the *Report* and the various American Bar Association reports are silent. The *Handbook* does not press this means of expediting the big case. This is a matter which could and should be disposed of at pre-trial by the court's ascertainment from defendants whether justification, good motives, and the like are going to be raised as defenses, and the making of a decision at that time as to whether to receive evidence with respect to such defenses.

*Advance Determination of Evidence and Law Problems.* Certain types of evidence problems, such as competency, can often be disposed of before trial;<sup>180</sup> but it is debatable whether to require, as has been done in

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177. Cf., 1957 *Seminar*, 21 F.R.D. 395, 521 (1958); 1958 *Seminar*, 23 F.R.D. 319, 410 (1959). In a recent case, in answer to interrogatories, one defendant listed 10 times as many alleged competitors as enumerated by the other four defendants. The court was not willing to adopt a procedure whereby letters would be secured from executives of such companies stating what products were made by their companies, with a right reserved to defendants to call them for cross examination if so desired.

178. In *United States v. Shubert*, 14 F.R.D. 471 (S.D.N.Y. 1953), several lists of documents containing uniform provisions were agreed upon by counsel, thus effectively reducing the number of documents to be offered at trial.

179. Letter from head of Antitrust Division to Judge Prettyman, February 2, 1952, in 1957 *Seminar*, 21 F.R.D. 395, 543 (1958).

180. In the Investment Banking case, *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953), before trial the court had the parties submit briefs as to the admissibility of testimony previously given before a congressional committee. See also *Carlock v. Southeastern Greyhound Lines*, 8 Fed. Rules Serv. 16,261, Case 1 (E.D. Tenn. 1944); *Penn. v. Automobile Ins. Co.*, 27 F. Supp. 337 (D. Ore. 1939) (admitting testimony of a witness at a prior trial); *Volk v. Paramount Pictures*, 91 F. Supp. 902 (D. Minn. 1950) (admissibility of judgment obtained by Government); *United States v. Driver Harris Co.* Civil No. 942-56, D.N.J., 1956, pretrial order of April 7, 1961 (documents); *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70051 (E.D. Pa. Feb. 26, 1960); *United States v. Certain Tracts of Land in Los Angeles County*, 63 F. Supp. 175, 181 (S.D. Cal. 1945); *Parmelee Transportation Co. v. Keeshin*, 1960 Trade Cas. ¶ 76682 (N.D. Ill. 1960). Cf., *United States v. Libbey-Owens-Ford Glass Co.*, 10 F.R.D. 346 (N.D. Ohio 1950). In *United States v. Shubert*, 14 F.R.D. 471 (S.D.N.Y. 1953), where many of the allegations as to the course of business activities of defendants were admitted, the Government brought on a

some cases, that evidential objections be made and disposed of before trial. The *Handbook* provides for this procedure, but does not insist upon it. Theoretically, this procedure could save much time at trial and enable a party to know whether he can rely on what he has as enough, or whether he needs more evidence to prove a point. However, it also has the offsetting tendency of promoting a host of objections which otherwise might not be made.<sup>181</sup> A general statement of purpose for which classes of particular documents are offered may be of some help in such a situation.

In some instances, it should be possible to have advance determinations made of law questions during pretrial,<sup>182</sup> which would govern the trial unless controlling precedent or a showing of manifest injustice later otherwise persuades.<sup>183</sup>

The *Handbook* states that the court should, in the pretrial schedule, arrange to hear and rule on any motions raising or attacking affirmative and other defenses that are not so closely interwoven with the main body of the case as to make a separate hearing impracticable or unwise.<sup>184</sup> It also lists many types of issues, some of which would be raised by way of affirmative defenses, which it considers possible issues for separate trial.<sup>185</sup> Where affirmative defenses or other defenses lend themselves to determination apart from the merits of a suit, the court generally should be willing to determine them prior to the trial.<sup>186</sup> On the other hand, if the amount of evidence on such issues is not substantial and the question not free from doubt, justice in the form of a speedy trial on the merits may call for all such matters to be gone into at the trial.<sup>187</sup> At the trial, more-

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motion to strike affirmative defenses as to interstate trade and commerce, in part at least to obtain an idea of how deeply it would have to go into such matters at the trial. See Dow, *The Pretrial Conference*, 41 Ky. L. Rev. 363, 374 (1953).

181: In one case with which this writer was associated, defendants objected to: Each exhibit which is or purports to be an intra-company communication, comment, memorandum or report . . . and each communication . . . of or from any other defendant to this defendant, or to any person not a party to this suit, or from any such person . . . because such exhibits, (1) are not binding upon this defendant, (2) are hearsay and not the best evidence, (3) consist of opinion and conclusions, (4) do not constitute . . . records . . . made in the regular course of business, (5) were not made by any authorized person. . . .

182. See 1958 *Seminar*, 23 F.R.D. 319, 400-01 (1959).

183. 1958 *Seminar*, 23 F.R.D. 319, 408-09 (1959).

184. *HANDBOOK*, p. 37.

185. *HANDBOOK*, p. 52.

186. See 13 A.B.A. SECT. ANTITRUST L. 194-95; 1958 *Seminar*, 23 F.R.D. 319, 415 (1959).

187. *Cf.*, *Donlan v. Carvel*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70086 (D. Md. April 17, 1961). In recent years in a number of antitrust cases, plaintiffs have been confronted with long periods of delay before a trial on the merits because defenses of statute of limitations have gone through district and appellate court stages.

over, such defenses may never be pressed.<sup>188</sup>

*Request to Admit.* Judges in protracted cases should take a more liberal view with respect to requests to admit.<sup>189</sup> They should not hesitate, as many do,<sup>190</sup> to require a request for further admission to be answered where the circumstances so warrant. Many a big case, where control of a market is in issue, could be appreciably expedited if courts would not be frightened by the fetish of "opinion" to require an answer to an interrogatory asking a defendant to list its competitors.<sup>191</sup> A request for admission of facts keyed to documents available to both parties might be a tool to expedite the trial of an antitrust case.<sup>192</sup>

*Summary Judgment.* Courts should be receptive to motions for summary judgment in antitrust cases, especially where factual disputes are reduced to a minimum by the use of probative documents or by the absence of serious conflicting factual contentions in the affidavits of both sides. No more than with respect to pleadings<sup>193</sup> should an antitrust case be considered in a special category as to the applicability of summary judgment.<sup>194</sup> There is much precedent for the use of a motion for summary judgment in antitrust cases.<sup>195</sup> The more frequent use of such pro-

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188. See 1957 *Seminar*, 21 F.R.D. 395, 504 (1958). Of course, this may be of small comfort to a plaintiff who has spent much time and effort in preparing to meet this defense.

189. Cf., Dow, *The Pretrial Conference*, 41 Ky. L. Rev. 363, 369 (1953); 1958 *Seminar*, 23 F.R.D. 319, 533-34 (1959). But see Freund, *The Pleading and Pretrial of An Antitrust Claim*, 46 CORNELL L.Q. 555, 568-70 (1961).

190. E.g., *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1959 Trade Cas. ¶ 76229 (S.D.N.Y. 1959).

191. Courts are split on this matter of "opinion." The defendant normally will know all its competitors or at least all those of any significance. If it really is not in position to make an unqualified assertion, it merely can give a qualified one. For a liberal approach to this problem of opinion, see *United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960).

192. In *United States v. Shubert*, 14 F.R.D. 471 (S.D.N.Y. 1953), counsel for plaintiff prepared a narrative statement as to the history of theatre holdings in a certain city based upon some hundred documents, with footnote references to the documents. Defendants refused to stipulate to this statement, but when served with a request to admit, did comply with the request. See 1957 *Seminar*, 21 F.R.D. 395, 539 (1958).

193. See text following note 44 *supra*.

194. Judge Weinfeld's approach in *United States v. Bethlehem Steel Corp.*, 157 F. Supp. 877 (S.D.N.Y. 1958), leaves much to be desired in this respect. But see also *Life Music, Inc. v. Broadcast Music, Inc.*, 23 F.R.D. 181 (S.D.N.Y. 1959). In a recent antitrust case in the Western District of Pennsylvania, the court indicated its intention to follow the *Bethlehem* case upon being advised of a party's intent to file a motion for summary judgment even before he had any knowledge of the factual basis for his motion, based on the area of factual dispute between the parties.

195. E.g., *Associated Press v. United States*, 326 U.S. 1 (1945); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. General Instrument Corp.*, 87 F. Supp. 157 (D.N.J. 1949); *Sandidge v. Rogers*, 167 F. Supp. 553 (S.D. Ind. 1958); *H. J. Heinz v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960); *Hilton v. Triangle Publications, Inc.* 27 F.R.D. 468

cedure for partial or entire judgment purposes, where documents or statistical material are the heart of the case for one or for both sides, might well expedite the disposition of an antitrust suit. Even when denied, such a motion may measurably shorten the trial of an antitrust case.<sup>196</sup> It will generally be advisable to provide in a pretrial order covering the authenticity of documents that it be applicable on motions for summary judgment as well as at a trial.<sup>197</sup>

*Offering or Reading Whole Documents.* Time might be saved if courts refrained from requiring that the whole of a document be offered or read merely because part of it was read by one party. Where undramatic interrogatory answers are desired to be used in evidence, time of the court might be saved by introducing them before the court reporter, if counsel are willing, either by reading them or filing a copy with the clerk of the court and having the reporter note the offer in the transcript.

*Joint Objections.* Time may be saved at a trial by agreement that an objection by counsel for one defendant will be deemed to be made on behalf of all except where express disclaimer is made. Where there are a number of counsel for different defendants, a joint brief by them dealing with common problems often helps lessen the ultimate number of pages of briefs submitted to the court.<sup>198</sup>

*Interstate Commerce.* A difficult problem arises where the question of interstate commerce is a serious one. The court can hear the evidence on that question and on the merits together, and the convenience of witnesses often is a strong inducement for this procedure. The court may ask that the interstate commerce issue be decided first, or only after it has held for the plaintiff on the merits, or after denial of a motion to dismiss at the end of plaintiff's case. As early as possible, the court should indicate whether it is seriously concerned over an interstate commerce defense so that the parties may have some conception of how much

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(S.D.N.Y. 1961); *Silver v. N.Y. Stock Exchange*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70053 (S.D.N.Y. June 19, 1961). Cf., *Atwood v. Kerlin*, 264 F.2d 4 (2d Cir.), cert. denied, 361 U.S. 817 (1959).

196. As it did in the *Bethlehem* case, 157 F. Supp. 877 (S.D.N.Y. 1958). See 1958 *Seminar*, 23 F.R.D. 319, 424-25; 1957 *Seminar*, 21 F.R.D. 395, 520 (1958); Freund, *supra* note 189 at 576-77.

197. "Subject to correction, if and as error may appear, the following provisions will apply to documents . . . marked for identification . . . intended to be relied upon by the respective parties upon the trial of this cause, or (b) used on a motion for summary judgment." Pretrial Order in *United States v. American Radiator & Standard Sanitary Corp.*, Civil No. 14469, W.D. Pa., 1958.

198. In some cases, the practice has been to file such brief together with individual briefs dealing with particular problems of particular defendants.



proof seems to be called for.<sup>199</sup>

*Book of Excerpts.* It may be possible for counsel to make up a book of excerpts from exhibits, interrogatory answers, depositions, and admissions. Counsel could then offer the documents, and use the book of excerpts during the trial;<sup>200</sup> or possibly even offer the book of excerpts in evidence.<sup>201</sup>

*Reference to Prior Proceedings.* The trial of a number of antitrust cases could be expedited considerably if the courts would allow a wide breadth of reference to prior proceedings in which the defendants have been involved, particularly where both involve the antitrust laws and the alleged violation is an element in the second case. The plaintiff or the defendant, as the case may be, should be allowed to refer to the fact of conviction, acquittal, judgment of violation, or dismissal, as evidence to be considered along with other evidence. It should also be possible to refer to facts in the prior case, developed by testimony or documents in that case, by reference to an available record of that case or a relevant portion of its record which has been made a part of the current record. It should, of course, be open to counsel to attempt to explain away the prior decision by attacking or refuting the prior testimony or documents. Where the history of an industry has been surveyed in one case, a succeeding case should be able to rely upon that history, subject to the right of counsel to argue or offer proof to the contrary. Documents authenticated in a prior case should not have to again be authenticated by their proponent. A court in pretrial conference might well have counsel agree as to the use of relevant parts of the prior record, subject to the right of counsel to explain away or impeach such parts. The State of Louisiana has gone quite far in this direction.<sup>202</sup> Although there is considerable

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199. In the *Investment Banking* case, *supra*, Pretrial Order No. 3 provided that no separate proof as to interstate commerce be received except on motion by plaintiff on leave of the court just prior to resting its case.

200. This was done in *United States v. Linde Air Products Co.*, 83 F. Supp. 978 (N.D. Ill. 1949). As to using as an exhibit a document summarizing other bulky documents, see *Seminar*, 28 F.R.D. 153 (1961).

201. See HANDBOOK, App. 49.

202. LA. REV. STATS. 51:133 (1950):

In any suit under this part . . . the judge shall receive in evidence any record or parts of the record of any court of any state or of the United States in any legal proceeding to which the defendant is or has been a party, on the condition that all the record is produced unless the certificate of the custodian shows that all of it is not available. However, the testimony of a witness shall not be received unless the party against whom it is offered has the opportunity to cross examine, but the defendant may put the record or parts of it in evidence whether the state or other plaintiff has had the right to cross examine or not, and in the absence of denial, explanation, or counter proof, the . . . record, or testimony, shall be prima facie evidence of the facts set forth.

The above is part of a statute dealing with monopolies.

authority for such an approach,<sup>203</sup> some courts have refused to shorten a trial by reference to another proceeding.<sup>204</sup> In *Paramount Pictures, Inc. v. United States*,<sup>205</sup> the trial court allowed in evidence decisions by arbitrators and an appeal board which had dealt with the activities of particular defendants in particular localities. The Government had not been a party to those proceedings. Some courts, in patent and trade-mark cases, give weight to decisions of other courts relating to the patent or trade-mark in question.<sup>206</sup>

*Stipulation of Facts.* The court should encourage counsel to stipulate facts or to state what alleged facts they will not contest.<sup>207</sup>

*Authenticity.* While a passing reference to the problem of authenticity has been made elsewhere in this article,<sup>208</sup> it is a problem which needs further comment. In a case where there are many documents, all or almost all of which come from the defendants' files, undue protraction is caused by a plaintiff having to go through a step-by-step authentica-

203. *Standard Oil Co. v. United States*, 221 U.S. 1, 38, 70, 74, 76 (1911). That the defendant appellants contested the use of the prior Ohio proceedings, see 26 S. Ct. Record, Appellants' Oral Argument, p. 28. Also see *Grant Brothers Const. Co. v. United States*, 232 U.S. 647 (1914); *Noble v. United States*, 319 U.S. 88, 93 n. 4 (1942); *Dobson v. Comm'r*, 320 U.S. 489, 501 (1943); *United States v. Columbia Steel Co.*, 334 U.S. 495, 532 (1948); *B. F. Goodrich Co. v. Consolidated Rubber Tire Co.*, 251 Fed. 617 (7th Cir. 1918); *United States v. Mid-Continent Petroleum Corp.*, 67 F.2d 37 (10th Cir. 1933); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 147 (3d Cir. 1938); *Pfotzer v. Acqua Systems*, 162 F.2d 779 (2d Cir. 1947); *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583-84 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *Friedman v. Sealy, Inc.*, 274 F.2d 255 (10th Cir. 1960); *Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co.*, 232 Fed. 362 (E.D. Mich. 1915); *Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 24 F. Supp. 481 (S.D.N.Y. 1938); *United States v. Siegel Bros.*, 52 F. Supp. 238 (E.D. Wash. 1943); *United States v. Paramount Pictures*, 66 F. Supp. 323, 341 (S.D.N.Y. 1946); *City of Bridgeport v. United States Fidelity & Guaranty Co.*, 105 Conn. 11, 19-27, 134 Atl. 252 (1926). Cf., Note, 46 Iowa L. Rev. 400 (1961).

204. *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, 248 U.S. 55, 63 (1918); *Twentieth Century Fox v. Brookside Theatres*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *United States v. Aluminum Co. of America*, 1 F.R.D. 48 (S.D.N.Y. 1948). In *Monticello Tobacco Co. v. American Tobacco Co.*, 197 F.2d 629 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952), the reluctance of the court to allow any use, for the greater part of the trial, of the record in the government's case against the defendants had much to do with the large size of the record.

205. 343 U.S. 131 (1948). This material was received by the trial court over strong objection of the counsel for defendants.

206. See *Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co.*, 232 Fed. 362 (E.D. Mich. 1915); *Meurer Steel Barrel Co. v. United States*, 74 Ct. Cl. 428 (1932); *Emerson Elec. Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 24 F. Supp. 481 (S.D. N.Y. 1938); *B. F. Goodrich Co. v. Consolidated Rubber Tire Co.*, 251 Fed. 617 (7th Cir. 1918).

207. See HANDBOOK, p. 43; 1958 *Seminar*, 23 F.R.D. 319, 462 (1959); Jinkinson, *Observations on the Trial of an Antitrust Case*, 5 ANTITRUST BULL. 551, 559-60 (1960).

208. See text following note 88 *supra*; *Seminar*, 28 F.R.D. 149 (1961). As to the use of a request for admission of facts for such purpose, see *United States v. National Surety Corp.*, 25 F.R.D. 249 (E.D. Pa. 1960).

tion of documents. The *Handbook*<sup>209</sup> has an admirable exposition of how to eliminate or lessen this problem, but its *Appendix* discussion does not lean toward compulsion as in the case of requiring plaintiff to show relevance and materiality. Pretrial orders are often based upon stipulations of the parties, and some of such orders provide for authenticity of documents with the right of defendants to show otherwise at the trial, while others merely provide for authenticity if not objected to on that ground. Defendants are in the best position to show whether "X" really signed a document and had the authority to do so. The courts should therefore press counsel to accept a pretrial order of the first type and not of the second, unless counsel can demonstrate to the satisfaction of the court that there is a genuine dispute as to authenticity.<sup>210</sup> In this connection, a case with many documents can generally be expedited through collaboration of counsel in the use, as an exhibit, of a position identification list of personnel whose names appear on documents.

*Conferences Between Counsel.* Where objections are made to discovery proceedings, the *Handbook*<sup>211</sup> admonishes that the court should require counsel to confer prior to any hearing on the objections to see whether the objections can be obviated or the area of dispute narrowed.<sup>212</sup> Where motions are made, a similar procedure seems advisable. This should not only save time for the court and counsel, but should also have the effect of curtailing broadside objections.

#### PRACTICAL OBSERVATIONS AND CONCLUSIONS

Almost all government civil antitrust cases and some private antitrust cases are tried before a judge without a jury. Most government criminal cases and most private antitrust suits are tried before a jury. Federal Trade Commission cases are tried before a hearing examiner. Certainly, many of the tools discussed in the *Report* and the *Handbook* are worthy of consideration whether the trial is before a court or jury. However, the closer that particular subject matter comes to a decision on the merits, such as "cumulative evidence," the less applicable such recommendations may be to jury trials in view of the danger that the judge will usurp the functions of the jury. On the other hand, it would seem that many judicial recommendations could properly be applied, as some are, in Federal Trade Commission proceedings.

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209. HANDBOOK, App. 52-53.

210. For a stipulation obviating this issue, see 1954 A.B.A. REPORT 149. See also 13 A.B.A. SECT. ANTITRUST L. 197 (1958).

211. HANDBOOK, p. 41. See also 13 A.B.A. SECT. ANTITRUST L. 196-97.

212. That it is easier to make counsel confer than to have them reach agreement, see *United States v. Carter Products, Inc.*, 4 F.R. SERV. 2d 33,342, Case 3 (S.D.N.Y. 1961).

In criminal cases, the *Handbook* recommends that many of its recommendations be purely on a voluntary basis. Defendants in such cases are entitled to be present at pretrial conferences, but may make written waiver of such right.<sup>213</sup>

The *Report* and the *Handbook* contain many recommended devices for counsel and the judge to use in expediting the "big case." While the *Handbook* is more comprehensive and more flexible than the *Report*, both represent much thought and effort. Although many of their devices are admirable, others seem more dubious despite their talented authorship. Expediency may be had at too high a price. The Director of the Office of the Administrator of the United States Courts has expressed doubts that the federal courts have the manpower to carry out the recommendations in the *Handbook*. He has suggested that administrative assistants be assigned to judges to perform ministerial tasks with respect to protracted cases.<sup>214</sup>

The tendency in antitrust matters to expedite at the expense of substance is not confined to the courts. In 1952, the hearing examiner for the Federal Communications Commission began hearings to determine the fitness of Paramount Pictures Company and United Paramount to control television licenses and, with regard to the latter, to determine whether a merger with the American Broadcasting Company should be allowed.<sup>215</sup> A major element within these issues was the antitrust history of the applicants. After extensive hearings on such past history and at a time when much evidence was largely completed, the applicants, upon a plea of expedition and relying heavily on the Supreme Court's opinion in the *Oregon Medical* case, moved the Commission to have the hearings terminated and to have all past antitrust history disregarded. Not only was this motion granted over the opposition of the Commission's staff, but the staff was not allowed to go into more recent antitrust history of the applicants. This is expedition with a vengeance.

Another aspect of the *Report* and the *Handbook* is puzzling to this writer. They, as shown by what has occurred in several antitrust cases, seem to have shifted much of the time factor from the trial to the pretrial. In some instances, pretrial proceedings of staggering proportions have ensued. Days and weeks are spent discussing documents and arguing

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213. HANDBOOK, pp. 46, 51; App. 63 ff. See Kaufman, *The Apalachin Trial: Further Observations on Pretrial in Criminal Cases*, 44 J. AM. JUN. Soc'y 53 (1960). See also *Seminar*, 28 F.R.D. 78, 157 (1961).

214. See N.Y. State Bar Ass'n Sect. on Antitrust Law, *Antitrust Law Symposium*, 1960 TRADE REG. REP.

215. *In re Applications of Paramount Pictures, Inc.*, Nos. 10031-10034, 10046-10047, 10110, FCC 1951.

objections to them. Mammoth briefs are written, pretrial as well as after trial. Some judges apparently believe they have to come in contact with all aspects of the documentary case of the parties before trial. Judges take over the function of counsel, and when they bend under the burden, they do such things as to demand of counsel specifications of a number of "most important documents." They are called upon to make decision after decision prior to the actual trial.<sup>216</sup> In a number of instances, alleviation of the burden on the court is accompanied by an increase of the burden on counsel.

Regardless of all that has been said, it is clear that pretrial devices are generally worthwhile in the handling of a "big case." They often expedite the ultimate decision in a case, and pretrial orders of an extremely wide scope are possible.<sup>217</sup> However, pretrial is not and should not be a substitute for trial; and a test for any device should be: "Does it advance a just decision?"<sup>218</sup>

One of the most important devices for handling a big case is the use of factual trial briefs after the trial. A primary function of such briefs is to synthesize a large mass of documents and testimony into a pattern which has coherence as a whole. Such a brief also marshalls the evidence with respect to particular issues. Answering and reply briefs can and should serve to greatly ease the burden of a judge by limiting the area of dispute as to what the documents and testimony prove, and by relieving him from the necessity of any minute examination of the record.<sup>219</sup> It may well be that the distillation process which takes place in the minds of counsel who prepare such briefs may lead to the omission of a reference to a number of documents introduced at the trial, but the few minutes it takes to put such evidence into the record is more than made up by the hours saved in not having had to discuss such documents prior to or early in the trial.

The *Report* and the *Handbook* are guides to a virtuous goal. It is submitted, however, that the goal is not worth the effort if the effort is allowed to endanger much greater goals.<sup>220</sup> It is hoped that the approach

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216. *Padorani v. Bruckhausen*, 293 F.2d 546, 551 (2d Cir. 1961); *Syracuse Broadcasting Corp. v. Newhouse*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70130 (2d Cir. Oct. 4, 1961).

217. *E.g.*, *United States v. 70.39 Acres of Land*, 164 F. Supp. 451 (S.D. Cal. 1958).

218. For a pretrial foul-up, see *Mitchell v. Johnson*, 274 F.2d 394 (5th Cir. 1960); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543 (9th Cir. 1960).

219. See *United States v. E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 129 (D. Del. 1911); *SEC v. Glass Marine Indus.*, 194 F. Supp. 879 (D. Del. 1961).

220. In *Almance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), the court said:

Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. Complaints heard as to the law's

of the *Report* and the *Handbook* may be modified so as to reshape their recommendations into a pattern wherein expedition may be encouraged without sacrifice of substance.

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delays arise because the delay has injured litigants, not the courts. For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary.

Compare Judge Medina's statement: "As far as I am concerned that hurry, hurry business is out." Medina, *Judges as Leaders in Improving the Administration of Justice*, 36 J. AM. JUD. SOC'Y 6, 12 (1952). See Nims, *Some Comments on the Relation of Pretrial to the Rules of Evidence*, 5 VAND. L. REV. 581, 587-88 (1952):

Perhaps the most serious error of bench and bar in the past many years has been the attempt to make court procedure an exact science, to force litigants to conform to rules rather than to use the rules to meet human needs; to put form before substance; the system above the service it can render. We must have rules but by this time we ought to use them more wisely and mercifully. Also see dissenting opinion, *Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir. 1961).

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